The Acquisition and Leveraged Finance Review

Second Edition

Editor
Christopher Kandel

Law Business Research

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This article was first published in
The Acquisition and Leveraged Finance Review - Edition 2
(published in September 2015 – editor Christopher Kandel)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-70-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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THE ASSET MANAGEMENT REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BHARUCHA & PARTNERS

CONYERS DILL & PEARMAN

DLA PIPER WEISS-TESSBACH RECHTSANWÄLTE GMBH

GILBERT + TOBIN

GOODMANS LLP

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EDITOR'S PREFACE

Acquisition and leveraged finance is a fascinating area for lawyers, both inherently and because of its potential for complexity arising out of the requirements of the acquisition process, cross-border issues, regulation and the like. It can also cut across legal disciplines, at times requiring the specialised expertise of merger and acquisition lawyers, bank finance lawyers, securities lawyers, tax lawyers, property lawyers, pension lawyers, intellectual property lawyers and environmental lawyers, among others. An additional area of complexity and interest at the moment comes out of market forces that are driving convergence in the large cap leveraged financings between loan and high-yield bond products generally, as well as between different markets (particularly pressure on markets outside the US to conform to terms available in the US market but sometimes also *vice versa*), and in some cases the market is still debating whether to adjust for differences in bankruptcy, guarantee or security regimes.

The Acquisition and Leveraged Finance Review is intended to serve as a starting point in considering structuring and other issues in acquisition and leveraged finance, both generally but also particularly in cases where more than just an understanding of the reader's own jurisdiction is necessary. The philosophy behind the sub-topics it covers has been to try to answer those questions that come up most commonly at the start of a finance transaction and, having read the contributions, I can say that I wish that I had had this book available to me at many times during my practice in the past, and that I will turn to it regularly in the future.

Many thanks go to the expert contributors who have given so much of their time and expertise to make this book a success; to Nick Barette, Gideon Roberton and Shani Bans at Law Business Research for their efficiency and good humour, and for making this book a reality; and to the partners, associates and staff at Latham & Watkins, present and past, with whom it is a privilege to work. I should also single out Sindhoo Vinod and Aymen Mahmoud for particular thanks – their reviews of my own draft chapters were both merciless and useful.

Christopher Kandel
Latham & Watkins
September 2015

Chapter 3

AUSTRIA

Jasna Zwitter-Tehovnik and Jože Vraničar[1]

I OVERVIEW

During the decade preceding the financial and economic crisis, Austria has developed into a buoyant market for both domestic and international M&A activity, with some of the peak years seeing over 400 deals.

Compared to the crisis years, 2014 seems to indicate some improvement in the market despite not having been able to deliver on the expectations. The cross-border deals still surpass the domestic activity by approximately two to one. The majority of the international transactions involves international investors buying into the local market rather than *vice versa*. The most notable deals have been recorded in the real estate and banking sectors respectively.

Traditionally, the common source for M&A transactions relating to the Austrian investors has been loan finance. In recent times, this type of funding has almost exclusively taken the form of senior loan facilities, with commercial banks acting as the prevalent source of funding. Depending on the value of the particular deal, the structure will be bilateral or characterised by either primary or secondary syndication. Many of the syndicates typically include only domestic banks. In addition, the mechanism of risk or funded participation is frequently employed to reduce the risk of a single lender.

On the other hand, where a certain M&A activity pertaining to the Austrian market is part of a wider transaction or concerns a non-Austrian investor, the funding will most likely originate outside Austria and will not be characterised by the specifics briefly described above.

1 Jasna Zwitter-Tehovnik is a partner and Jože Vraničar is an associate at DLA Piper Weiss-Tessbach Rechtsanwälte GmbH.

Given that financing by way of (senior) loan facilities is the prevalent form in acquisition and leveraged finance in our jurisdiction, in most cases this section does not highlight any aspects applicable to other types of finance.

II REGULATORY AND TAX MATTERS

i Licensing

Austria has a relatively long list of services either requiring licensing as a credit institution in Austria or passporting of an equivalent licence obtained elsewhere in the European Economic Area (hereinafter referred to as a banking service). The Austrian authorities have traditionally taken a strict stance as to what qualifies as a banking service. Nevertheless, even nowadays a number of open issue remain.

According to the Austrian Banking Act,[2] concluding loan agreements as to monetary amounts, or providing monetary amounts as loans, is considered credit business (and as such a licensable banking service), provided it is being conducted on a commercial basis.[3]

Generally speaking, granting a single loan facility to a borrower registered in Austria should not necessarily constitute a banking service regardless of whether such facility is secured or unsecured. Conversely, repeatedly providing loans to a borrower or different borrowers in Austria will trigger the licensing requirement assuming that the generation of income is intended by the lender. In addition, granting a single loan with the intention that such loan be followed by further facilities in the future, will most probably also act as a sufficient trigger.

It is worth noting that the Austrian Administrative High Court[4] has held that solely charging interest or fees as consideration or providing for the right of several drawdowns in respect of a facility does not suffice to constitute a banking service. Furthermore, there is no explicit intra-group exception from the licence requirement and, thus, the general regime would, in principle, equally apply to intra-group loans.

A possible breach of the licensing requirements results in the following:

a administrative fine of up to €100,000 payable by the lender;

b invalidation of every agreement on consideration payable to the lender (e.g., interest and fees); and

c invalidation of any ancillary security.

Of course, the need for an Austrian banking licence is only triggered if the territorial applicability of the Austrian Banking Act is given. For instance, if a non-Austrian member of the obligor group is designated as the actual borrower the Austrian Banking Act might not become relevant. Alternatively, the provision of the loan can be structured based on both the offer to enter into a credit relationship as well as the acceptance of this offer being made outside Austria. Nevertheless, the ambiguity mostly remains as to whether

2 *Bundesgesetz über das Bankwesen – Bankwesengesetz* (BWG).

3 *Gewerblich.*

4 *Verwaltungsgerichtshof (VwGH).*

taking security in Austria on a commercial basis (whereas the granting of the loan is each time outside the scope of the Austrian banking law) on its own may constitute a banking service. Likewise, merely acting as a security trustee on a commercial basis also exposes the structure to certain risks. In both of those instances it is advisable to develop in advance a strong case for mere occasional activity (at least as regards Austria).

ii Tax matters

In terms of taxation, the Austrian tax regime allows for the formation of tax groups. The advantage is the offsetting of tax losses of one member against tax profits of another member. As a result, the interest expense related to an acquisition is deductible from the operating profits of the acquired Austrian operating group. The main requirement is that, as regards a direct or indirect subsidiary, there is a share exceeding 50 per cent of the registered capital and the majority of all voting rights are held throughout the particular fiscal year. Direct foreign subsidiaries of Austrian tax group members may also be included in an Austrian tax group. However, the total amount of foreign losses that can be utilised in any given year is currently limited to 75 per cent of the taxable income of the Austrian tax group members. Foreign losses that cannot be utilised in a particular year become part of the tax loss carry-forwards of the head of the group.

The amortisation of goodwill for share deals has been abolished. In addition, Austrian tax relief is no longer granted for intercompany interest expenses where the recipient is subject to a low tax jurisdiction or a special tax regime. Specifically, the deductibility of interest payments made between related parties is no longer possible if the payments are not 'sufficiently' taxed or are not taxed at all at the level of the recipient, whereby a tax rate of 10 per cent at the level of the recipient is considered sufficient for these purposes. Lastly, any interest on debt incurred for the purpose of acquiring a share within a group of companies is not deductible.

The Austrian Administrative High Court ruled that the deductibility in connection with debt finance for an acquisition is not limited to interest in the strictest sense of the word but also encompasses commitment fees. Considering the course of the relevant proceedings, this argument may also be extendable to include a wide range of other financing costs, e.g., other payments to the creditor or third parties such as brokers, notaries, or lawyers.

Generally, no withholding tax is payable on loan interest paid to a non-resident entity. However, the non-resident entity is subject to Austrian corporate income tax if the loan in question is secured against Austrian real estate or other Austrian rights. This notwithstanding, any payments made to a non-resident silent partner in an Austrian company are subject to a withholding of 25 per cent unless the rate is reduced or the payments are exempt under an applicable double taxation treaty.

As opposed to the interest payable under loans, if the debtor is resident, has its registered office in, or is effectively managed in Austria, or is an Austrian branch of a foreign bank, then interest payments with an Austrian source under certain publicly issued bonds are also subject to withholding.

Under Austrian tax law, there are no explicit transfer pricing regulations available. Instead, Austria generally applies the OECD transfer pricing guidelines referring to the OECD model tax convention in order to define the local requirements as regards arm's length, the documentation standards, or penalties. Furthermore, the Austrian tax authorities have issued the Austrian transfer pricing guidelines setting out the authorities' understanding of inter-company business relationships with regards to their arm's-length classification (mostly based on the OECD transfer pricing guidelines).

v Thin capitalisation

There are no explicit thin-capitalisation rules in Austria stipulating the minimum equity required by a company. Basically, group financing has to comply with the general arm's-length requirements. Therefore, the appropriate ratio between an Austrian entity's equity and debt will mainly depend on the individual situation of the company (profit expectations, market conditions, etc.) and its industry.

Furthermore, under Austrian commercial law, a minimum equity ratio of 8 per cent is required. If this ratio falls below 8 per cent and the earning power (virtual period for debt repayment or redemption) of the company at the same time does not meet certain further requirements, a formal and public reorganisation process needs to be initiated.

III SECURITY AND GUARANTEES

i General

The legal framework in Austria provides for several different forms of security with highly developed and predictable rules as to their individual perfection and maintenance requirements. Likewise, the enforcement tends to be relatively straightforward and less cumbersome than in many other jurisdictions. Nonetheless, in practice it is customary to make use only of certain of those available options, namely:

a mortgage;
b security assignment of accounts receivable or receivables under insurance policies;
c pledge over a share in a limited liability company;[5]
d pledge over a bank account;
e (corporate) guarantee; and
f suretyship.[6]

Apart from the guarantee and suretyship, the remainder of the security interests require not merely an agreement between the parties as to the creation of the particular security interest but also a specific method of perfection. Specifically, whereas a mortgage over real estate located in Austria requires registration with the Austrian Land Registry upon notarisation of the parties' signatures on the mortgage agreement, all other cases depend on the notification of the third party debtor (or, if applicable, the company the share in which is subject to security). Alternatively, where the security relates to receivables and such receivables are noted in accounting books of the grantor of security, an annotation

5 *Gesellschaft mit beschränkter Haftung* (*GmbH*).
6 *Bürgschaft*.

in those books as to the creation of security can be employed.[7] In addition, all of these security interests as well as suretyships (although not guarantees as described below) are accessory to the creation and continued existence of the secured obligations. Accordingly, as a general rule, even an intermittent termination of the secured obligations will result in a termination of the security interest.

As opposed to the accessory forms of security, guarantees constitute an obligation independent of the secured obligations. Instead, the main issue here is to ensure that the wording of the security document sufficiently reflects this abstract nature. Otherwise, there is a risk that the security interest will be qualified as accessory suretyship. The primary indicators of an abstract guarantee are payment upon first request without reference to a particular secured obligation as well as lack of any kind of defences or other objections on the part of the grantor of security (e.g., relating to set-off or the legal relationship between the borrower and the creditor).

Moreover, to the extent a security interest could be construed as not referring to an obligation under a loan, a stamp duty of 1 per cent of the secured amount is payable in case of a suretyship but not on a guarantee. Similarly, the registration of a mortgage with the Austrian Land Registry triggers a fee of 1.2 per cent of the total secured amount.

Commonly, the security package will involve taking security over at least receivables, bank accounts, and shares, as well as guarantees.

ii Limitations

On another note, when structuring a finance transaction certain restrictions apply in respect of upstream and sidestream security and guarantees. Namely, Austrian law is characterised by the rules on the maintenance of capital of both limited liability and joint stock companies.[8] As a result, an entity is not permitted to pay out (distribute) the capital comprising its equity to its shareholders (or, if applicable, any other affiliate) except (in particular) in the following cases:

a arm's-length transactions;
b distribution of the balance sheet profits subject to the statutory procedure;
c reduction of the registered share capital subject to a statutory procedure; or
d distribution of any remaining amounts following liquidation.

This prohibition covers not only monetary payments but also any other kind of transactions providing a benefit. Should a particular transaction be within the scope of the prohibition, it is null and void as regards the relevant entity and shareholder or

7 Please note, however, that there is extensive case law available as to the requirements such annotation needs to comply with.

8 *Aktiengesellschaft* (*AktG*). Based on case law, these rules are equally applied to limited partnerships with merely limited liability companies or joint stock companies as unlimited partners.

affiliate and triggers liability for damages. In addition, the secured party is within its scope only to the extent it has known or should have known of the breach.[9]

As a consequence, any upstream or sidestream security or guarantee subject to the capital maintenance regime[10] is potentially exposed to the risk of ineffectiveness unless, generally speaking, the borrower as the benefiting party provides to the relevant provider of security an adequate (arm's length) consideration or if the finance party has concluded that the borrower is unlikely to default on its obligations or, respectively, the default would not expose the grantor of security to an existential risk, while the transaction is otherwise in the interest of the security grantor (corporate benefit).[11]

Furthermore, the Austrian Joint-Stock Company Act[12] sets out a prohibition on target companies being a joint-stock company from financing or providing assistance in the course of financing of the acquisition of their respective own shares or the shares of their parent entity. This prohibition is enforced regardless of whether the particular transaction concurrently constitutes a return of equity. Unlike the capital maintenance regime, the transactions breaching this provision remain valid yet are exposed to liability for damages.

Also, in syndicated lending transactions a security trustee is typically appointed for reasons of administrative convenience. Its role is to hold the security interests on trust for the benefit of all the lenders and any other parties entitled to benefit from the security. Such a structure results in the secured debt being significantly more tradable (an essential tool for ensuring compliance with the capital adequacy standards for banks). A syndicated lender may assign or novate part of the debt, while the security trustee continues to hold the relevant security, avoiding possible stamp duty and registration issues. However, the accessory[13] types of security must be held by the actual creditors. To address this, the covenant to pay the secured obligations to the lenders is supplemented by a parallel debt obligation. The borrower thereby acknowledges a separate debt to the security trustee for sums equal to the secured obligations under the finance documents as and when they fall due. All security is granted in favour of the security agent as parallel creditor, being accessory to and securing the parallel debt obligation. The secured debt remains the same throughout the life cycle of the loan facility, despite any transfer of debt by a lender.

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9 In assessing this, a financial institution acting as the secured party is required to observe high standards of duty of care.

10 For example, the target and/or the target group act as obligors in respect of the acquisition finance. Please note that a pledge over shares subsequently held by a foreign company in any of the entities of the target group is outside the scope of the capital maintenance regime.

11 *Besondere betriebliche Gründe*.

12 *Bundesgesetz über Aktiengesellschaften* (*Aktiengesetz – AktG*).

13 See above.

Although there have been some attempts[14] at incorporating the concept of parallel debt into Austrian law, given the lack of relevant case law, scepticism and opposition continue to prevail in the legal theory.[15] The sceptics point to the general rule of contract law that, in order to validly enter into a contractual obligation, a commercial rationale (*causa*) for doing so needs to be evident and permitted under law.[16] The commercial rationale may, for instance, be found in buying an asset, giving a gift or resolving a dispute.[17] As a result, unless no accessory security interests are being employed, there is a noticeable risk to using the parallel debt covenant and security trustee structure governed by Austrian law.

iii Preferential treatment

Another critical issue to consider when structuring a deal is the risk of a security or guarantee being avoided. Generally speaking, this might occur if the security or guarantee is considered a preference or a transaction at an undervalue. The relevant legal framework is most notably set out in the Austrian Insolvency Act[18] which is applicable to situations with ongoing insolvency proceedings. In addition, the Austrian Avoidance Act[19] also provides for the possibility of setting aside a security or guarantee in similar instances outside of pending insolvency proceedings.

A detailed analysis of the events triggering the risk of avoidance, in particular outside of pending insolvency proceedings, is beyond the scope of this article.[20] However, most importantly, the following actions may be appealed and declared invalid:

a a discharge of an obligation or granting of security has been made within 60 days prior to or after the occurrence of the inability to pay, the occurrence of over-indebtedness, or the filing of an application for the institution of the insolvency proceedings (in any case within a period of one year prior to the institution of the insolvency proceedings) and a discharge or security of such kind or at such time was not due to the respective other party, provided that the respective other party has been treated preferentially, or a discharge or security of such kind or at such time was due to the respective other party but the intention

14 Rabl, C 2012, 'Die Parallelschuld (Parallel Debt)', *Österreichisches Bankarchiv*, vol. 60, no. 6, pp. 674-681; Seeber, T 2014, '*Die Parallelschuld'* (Parallel Debt), *Österreichisches Bankarchiv*, vol. 62, no. 5, pp. 592–600.

15 See, for example, Apathy, P, Iro, G & Koziol, H (eds) 2012, *Österreichisches Bankvertragsrecht IX* [Austrian Banking Contract Law IX], Verlag Österreich, Vienna, pp. 395–396.

16 See the Austrian Supreme Court (OGH) in 6 Ob 152/05d.

17 OGH in 6 Ob 152/05d.

18 *Bundesgesetz über das Insolvenzverfahren* (*Insolvenzordnung – IO*).

19 *Anfechtungsordnung*.

20 In any case, it needs to be taken into consideration that, according to the Austrian Supreme Court, the rules of the Austrian Insolvency Act concerning avoidance of contracts, in particular those setting out the requirements, are mandatory rules of law (*Eingriffsnormen*) in relation to an Austrian person. Therefore, they would also apply in case of a connection to another jurisdiction.

of the insolvent debtor to treat the respective other party in a preferential manner has been known or should have been known to the respective other party; or

b a discharge of an obligations or granting of security has been made after the occurrence of the inability to pay, the occurrence of over-indebtedness or the filing of an application for the institution of the insolvency proceedings (in any case within a period of six months prior to the institution of the insolvency proceedings) and, the discharge of an obligation or granting of security has been disadvantageous to creditors of the insolvent debtor and the respective other party had knowledge or should have had knowledge of the inability to pay, of over-indebtedness or of the filing of the application for the institution of the insolvency proceedings.

IV PRIORITY OF CLAIMS

In case of an insolvency, claims belonging to a limited number of categories take precedence in terms of recovery over most other claims. Such categories of claims are:

a costs of the insolvency proceedings;

b expenses incurred in connection with the maintenance, management and administration of the insolvency estate (including taxes, duties, customs duties and social security contributions;

c remuneration claims of employees in relation to the time following the institution of insolvency proceedings;

d claims by certain employees related to the termination of their employment relationship;

e claims by counterparties based on mutually unperformed contracts which have been upheld by the insolvency trustee;

f claims arising in respect of the dispositions by the insolvency trustee;

g claims based on unjustified enrichment of the insolvency estate; and

h remuneration payable to certain privileged creditor associations.

Outside of an insolvency situation, the lender and the borrower are free to assign differing ranks to different outstanding loan obligations by means of contractual arrangement. Market standard intercreditor agreement wording can be employed and there is usually no need for any mechanism of structural subordination. This notwithstanding, the implications of the Austrian Act on Equity Substitution[21] need to be considered.

According to the Austrian Act on Equity Substitution, any loan provided by a shareholder to its subsidiary (as defined below) during a 'crisis' will be deemed as substituting equity. A crisis situation can arise owing to (1) an inability to pay debts (e.g., when the entity ceases to make payments as they become due and payable), (2) the

21 *Bundesgesetz über Eigenkapital ersetzende Gesellschafterleistungen* (*Eigenkapitalersatz-Gesetz – EKEG*).

over-indebtedness,[22] or (3) a need for reorganisation.[23] However, loans with a tenor of up to 60 days or loans provided before the crisis but granted during a crisis are outside the scope of this regime.

As for the definition of a 'shareholder' for the purposes of the Austrian Act on Equity Substitution, only those persons with a share of at least 25 per cent, with the majority of voting rights, or exercising a decisive influence over the company, are within its scope. Importantly, even a third-party lender such as a financial institution can be considered a 'shareholder' by virtue of factual circumstances, by exercising rights beyond those commonly granted to a lender in connection with a finance transaction.

If a loan is deemed equity substituting, a ban on its repayment to the relevant shareholder is imposed for the duration of the crisis. In case the shareholder was not the actual lender but rather only secured a loan provided by a third party, that third party will normally have the right to claim repayment from the borrower, except if the third party has been aware of the crisis at the time of the granting of the loan. In the latter case, as long as the crisis is still ongoing, the lender would be required to primarily enforce the security and claim recovery from the actual borrower only in respect of the remaining outstanding amounts.

V JURISDICTION

i Choice of law

The choice of law and other conflict of laws matters are subject to, as regards contractual aspects, the Rome I Regulation[24] and, in relation to the non-contractual relationships, the Rome II Regulation.[25] As a consequence, there is no general requirement for a transaction to have a link (of certain quality) to a certain jurisdiction in order to be able to make applicable the law of that jurisdiction to the transaction. The choice can be made in respect of the contract as a whole or only a certain part thereof.

Nevertheless, it needs to be noted that the choice of law can only relate to the contractual aspects. Matters such as applicable insolvency law or company law are outside the scope of the regulations. In addition, the Rome I Regulation explicitly excludes arbitration agreements and agreements on the choice of court, certain matters related to trusts or agent–principal relationship, and the obligations arising out of dealings prior to the conclusion of a contract, from its applicability.

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22 This is commonly construed as the value of the total assets of the company exceeding its total outstanding debt while no positive forecast can be made as to the future cash flow.

23 Defined as (i) the equity quota (the equity and untaxed reserves compared to the total assets) being below 8 per cent and (ii) the estimated liabilities repayment period exceeding 15 years, provided that this has been apparent from the latest annual accounts, would have been apparent from duly prepared annual accounts, or the lender otherwise has knowledge thereof.

24 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

25 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

Another important feature of the Rome I Regulation are the limits set to the parties by the public policy of the forum and the overriding mandatory provisions of the forum or, possibly, of the law of the country where the obligations arising out of the contract have to be or have been performed (insofar as those overriding mandatory provisions render the performance of the contract unlawful). The latter are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation.

ii Jurisdiction

As for a submission by an Austrian company to the jurisdiction of a foreign court, this will generally be recognised in finance transactions in Austria, assuming validity of the agreement on the submission and non-violation of any rules on exclusive jurisdiction. In most cases, the Brussels 1a Regulation[26] will apply. Outside the scope of applicability of the Brussels 1a Regulation, a sufficient relation of either the parties or the object of the dispute to the chosen jurisdiction may be required.

It is quite common for Austria-related transactions to be subject to arbitration agreements. These, in particular the issues as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed, are not subject to the rules laid down in the Brussels 1a Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. Rather, in the majority of cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958, will apply in that regard.

The recognition and enforcement of foreign judgments and arbitral awards is subject to the Brussels Ia Regulation, the New York Convention, or, respectively, Austrian domestic laws or (bilateral) international agreements on enforceability. According to the Brussels Ia Regulation, a judgment given in an EU Member State shall be recognised in any other Member State (excluding Denmark) without any special procedure being required. Likewise, a judgment given in an EU Member State which is enforceable in that member state is enforceable in the other EU Member States without any declaration of enforceability being required. As opposed to that, the New York Convention provides for the possibility of certain limited defences. As regards all other instances, in the absence of an applicable international agreement on enforceability, there is no automatic enforceability. Depending on the circumstances, the Austrian courts would decline the recognition and enforceability or re-examine the merits of the case.

Given the absence of applicable international agreements on recognition and enforceability with the US and Russia respectively, the standard market practice when dealing with those two jurisdictions is to opt for arbitration.

26 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

VI ACQUISITIONS OF PUBLIC COMPANIES

i Certain funds requirements

The Austrian Takeover Act[27] imposes certain obligations on the offeror. Section 4 no. 1 of the Austrian Takeover Act explicitly stipulates that the offeror may announce a bid only after ensuring that it can fulfil in full any cash consideration, and after taking all reasonable measures to secure the implementation of any other type of consideration. In addition, the offeror has to appoint a qualified expert, independent from the offeror, who must confirm that the offer is in compliance with the provisions of the Austrian Takeover Act, and in particular, with regard to the consideration offered, that the offeror has the financial means to fulfil the bid.

ii Mandatory offers triggered by a share pledge or enforcement of a share pledge

In general, mandatory offers are governed by the Austrian Takeover Act. A mandatory takeover offer is required if the offeror acquires a 'controlling interest' in the target company. A person holds a controlling interest if he or she holds a direct or indirect interest in the target company, exceeding 30 per cent of the voting rights attached to the shares with permanent voting rights. Such mandatory offers require that the price to be offered to the remaining shareholders must at least equal the average price paid for the shares during the previous six months prior to the acquisition of the controlling interest.

In case of the enforcement of pledged shares in a public company, the mandatory offer obligation is triggered in the same way as in case of any other acquisition. This scenario is common in acquisition financing, when a credit institution, following the borrower's default, enforces the share pledge and thus acquires the shares in a public company.

A pledge of shares in a public company does not itself trigger the duty to mandatory offer since the pledgor remains as the beneficial owner of the pledged shares and thus is entitled to exercise the voting rights attached to such shares.

In case of transfer of shares by way of security,[28] the voting rights may be theoretically exercised by the transferee, however, in practice the transferee is instructed by the transferor on how to exercise the voting rights so that such shares will not be attributed to the transferee and thus he or she will have no duty to mandatory offer.

iii Minority squeeze-outs

The Austrian Squeeze-Out Act[29] provides a procedure under which a majority shareholder may squeeze out all minority shareholders. A shareholder (including any affiliated companies) holding at least 90 per cent of the capital with voting rights and at least 90 per cent of the voting rights qualifies as a majority shareholder under the Austrian Squeeze-Out Act. The majority shareholder may require the holders of all remaining

27 *Bundesgesetz betreffend Übernahmeangebote (Übernahmegesetz – ÜbG).*

28 *Sicherungsübereignung.*

29 *Bundesgesetz über den Ausschluss von Minderheitsgesellschaftern (Gesellschafter-Ausschlussgesetz – GesAusG).*

shares to sell the shares to the majority shareholder. The necessary shareholders' resolution on the squeeze-out requires a simple majority vote.

The majority shareholder must offer to pay adequate cash compensation for the acquired shares to the minority shareholders. The squeeze-out of minority shareholders becomes effective with the registration of the squeeze-out with the Austrian companies registry. Upon such registration, the shares of the squeezed-out minority shareholders are automatically transferred to the majority shareholder. The amount of the cash compensation can be challenged in a review proceeding, to be commenced after the squeeze-out is implemented.

iv Other permitted conditionality

Generally speaking, the parties involved in an acquisition transaction can make the offer subject to certain conditions. However, for listed public companies, the Austrian Takeover Act stipulates that an offer may only be conditional if it is objectively justified. Such objective justification is given if the respective conditions are based on the fulfilment of certain legal obligations of the offeror or if the fulfilment of the conditions does not solely depend on the subjective decision of the offeror.

On the other side, a public offer cannot be made conditional on financing. The offeror must be able to settle the offer consideration when it is due and payable. Therefore, the offeror's financial adviser must confirm in the offer documentation that the offeror has sufficient funds to pay the consideration. The financial adviser will therefore review the financing arrangements of the offer very carefully, in particular the provisions of external financing.

v Disclosure requirements for financing terms including flex and fees

A takeover offer in Austria typically consists of an offer by the bidder to all shareholders of the target company to acquire their shares. The Austrian Takeover Act sets out minimum requirements for the offer document. Besides other required details, the bidder has to disclose in the offer document the conditions for the bid financing.

The bidder must disclose whether he or she will finance the takeover with his or her own funds or will make use of debt financing. In the case of the latter, the bidder has no obligation to provide the name of the financing credit institution in the offer document. However, the bidder is free to name the lender – this is recommended for the benefit of the bidder in case of a greater financing volume.

If an arrangement exists between the bidder and the financing institution which makes the interest payments of the bidder conditional on the cash flows of the target company, such arrangement has to be disclosed in the offer document.

vii Confidentiality requirements or other restrictions on debt issuance or syndication while the take private is under way

In general, during takeovers of listed companies, the intention of the offeror to make a public offer for a listed company or to take steps resulting in an obligation to launch a bid, has to be kept confidential to prevent premature disclosure.

In practice, confidentiality agreements are often entered into at the stage when negotiations between the parties begin. Since offerors have to oblige all participating parties to assure confidentiality, they usually prescribe internal rules to keep all communication confidential.

The confidentiality obligation under the Austrian Takeover Act applies also to financial arrangements, such as debt issuance and syndication.

VII OUTLOOK

For the remainder of 2015, no significant change in the 2014 trends is to be expected (i.e., the M&A activity will most probably remain moderately positive).

Some of the activity will certainly be attributable to the repositioning of the local banking sector. Likewise, due to the ongoing intensive efforts of restructuring their non-performing asset portfolios, it is rather likely that the local sources of finance will remain conservative when considering new finance opportunities or novel forms of financial products. In other words, new deals will most likely continue to be characterised by restrictive (financial) covenants and extensive security packages.

Possibly, the share of finance originating in Austria will reduce over the coming years as the Austrian investors continue to scale back their involvement abroad, in particular in Central and Eastern Europe.

Appendix 1

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Jasna Zwitter-Tehovnik LLM (NYU) is a partner at DLA Piper and a finance and projects practitioner, qualified in four jurisdictions: Austria, New York, Slovenia and as a solicitor of the Senior Courts of England and Wales. She advises commercial and investment banks, corporates, sponsors, private equity and mezzanine financiers on a wide range of financing transactions with a focus on acquisition finance, structured finance and project finance as well as debt restructurings.

The second area of Jasna's practice is infrastructure and energy projects, including private partnership transactions, (cross-border) mergers and acquisitions and privatisations, often with a focus on SEE, CEE and CIS regions. Jasna speaks regularly at seminars and lectures. She is author and co-author of the *Distressed Loan Handbook* and has written several articles and commentary articles in banking and capital markets and corporate law. Jasna is also ISDA counsel for Austria.

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Mag. Jože Vraničar is an associate in DLA Piper's finance and projects team in Vienna. He successfully passed the Austrian bar exam in 2014. He specialises in banking law, acquisition and corporate finance, and infrastructure projects across a wide range of industries, including construction and real estate, consumer goods, energy, hospitality and public services. Another significant pillar of his practice is providing advice on corporate and M&A matters.

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