# AUSTRIA

**Florian Klimscha, Jasmin Julia Denk, Christian Joellinger**

**(Freshfields Bruckhaus Deringer)**

## GENERAL

### Legislation

**1. What main legislation is applicable to insolvencies and reorganizations?**

*Insolvency*

The legislation applicable to the insolvency of natural persons and companies having their centre of main interest in Austria is the Austrian Insolvency Code (the Insolvency Code), as amended. The Insolvency Code provides for, in principle, three different proceedings:

- bankruptcy;
- reorganisation with self-administration (debtor in possession); and
- reorganisation without self-administration.

In addition to the Insolvency Code, the procedures for the restructuring and orderly winding up of credit institutions, financial institutions that are subject to supervisory consolidation and particular financial holding companies are established in the Act on the Recovery and Resolution of Banks (BaSAG), which has implemented Directive 2014/59/EU on the recovery and resolution of credit institutions and investment firms (BRRD) into national Austrian law.

Furthermore, the Austrian civil law, company law, labour law, information technology or intellectual property law, as well as tax law, include, among other things, insolvency-related provisions.

*Restructuring and reorganisation*

In relation to the restructuring of viable and (still) solvent companies and entrepreneurs, which are in financial difficulties, the Austrian Restructuring Code (the Restructuring Code) offers a novel preventive restructuring framework. The Restructuring Code entered into force with effect from 17 July 2021 and has implemented Directive (EU) 2019/1023 on preventive restructuring frameworks (Restructuring Directive) into national Austrian law.

Despite the adoption of the Restructuring Code, the Austrian legislator chose to adhere to the (existent) Austrian Business Reorganisation Law (the Business Reorganisation Law). In theory, the Business Reorganisation Law provides additional reorganisation procedures for (still solvent) companies that are undergoing a 'crisis' (as defined in the Business Reorganisation Law). In practice, however, these procedures are rarely (if at all) applied. Instead, the main practical purpose of the Business Reorganisation Law is the provision of a basis for directors' liability if certain criteria, which are also relevant under the Restructuring Code (ie, to determine a debtor's likeliness of insolvency), are met.

Furthermore, as regards pre-insolvency or, more general, distressed scenarios, the Austrian Law on Equity Substitution (the Equity Substitution Law) is of great practical relevance. Under the Equity Substitution Law, shareholder loans, which are granted to a company during its crisis, can be classified as equity substitution and may, therefore, be statutorily subordinated. As a result, these shareholder loans must not be repaid until the company has overcome the crisis (ie, if it has been successfully restructured).

## Excluded entities and excluded assets

**2. What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?**

## *Insolvency*

In general, both individuals and legal entities can be subject to insolvency proceedings. This includes general partnerships, limited partnerships, professional partnerships, professional limited partnerships, associations and European economic interest groupings, as well as a deceased person's estate and, in principle, universities. Furthermore, the Austrian Supreme Court of Justice has ruled that municipalities may also be subject to insolvency proceedings.

Owing to a lack of legal standing, civil partnerships, silent partnerships and cartels cannot enter into insolvency proceedings. Only their partners may be subject to insolvency proceedings. Furthermore, the Insolvency Code does not provide specific procedures for group insolvencies. Consequently, insolvency proceedings cannot be opened over such 'a group of companies' but over each company of such a group separately.

Reorganisation proceedings (with or without self-administration) do not apply to credit institutions, insurance companies or pension funds. For such entities, the Banking Act, the Insurance Supervision Act, the Pension Fund Act and the BaSAG provide special provisions.

The following assets are excluded from insolvency proceedings and are exempt from claims of creditors:

- inheritances, legacies and gifts to the extent not accepted by the insolvency administrator;
- any assets that the insolvency court decides to release from the estate;
- claims arising in the context of legal proceedings to the extent that the insolvency administrator does not enter into such proceedings;
- all rights that are incapable of being transferred to a person other than the debtor; and

- provided that the debtor is a natural person, a certain amount of monetary funds, which is granted to the debtor for their living expenses.

*Restructuring*

The Restructuring Code does not, in principle, apply to insurance undertakings or reinsurance undertakings, credit institutions, investment firms or collective investment undertakings, central counterparties and central securities depositories, financial institutions and entities, public bodies and natural persons who are not entrepreneurs.

The following claims are excluded from, or not affected by, restructuring proceedings:

- existing and future claims of existing or former workers;
- existing and future claims of occupational pension schemes;
- claims arising after the opening of restructuring proceedings;
- claims that arise from fines for criminal offenses of any kind; and
- maintenance claims.

Furthermore, restructuring proceedings do not have any impact on accrued occupational pension entitlements.

## Public enterprises

### 3. What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Austrian investments in partially or entirely nationalized companies are in most cases administered by the Österreichische Beteiligungs AG (ÖBAG), an Austrian stock corporation that holds the shares in these companies.

Other shareholdings in government-owned enterprises (eg, Austrian Federal Railways) are directly held by the Austrian state and administered by the Austrian government.

Because all these nationalized companies and government-owned enterprises are set up under Austrian private law (regularly in the form of a limited liability company or a stock corporation), there are no specific procedures as to the insolvency of these enterprises. Consequently, the general rules of the Insolvency Code apply, meaning that the creditors have the same remedies as in ordinary insolvency proceedings.

Statutory bodies under public law (eg, municipalities, cities with their own charter, federal states and the Austrian state itself) may also become insolvent. This is generally accepted and derived from their legal capacity. Consequently, in a statutory body's insolvency, the Austrian Insolvency Code will apply. Assets of such statutory bodies, which cannot be used to satisfy creditors without impairing the public interest are, however, exempted.

## Protection for large financial institutions

**4. Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?**

On 1 January 2015, the BaSAG, which implemented the BRRD, entered into force.

The BaSAG only applies to credit institutions, financial institutions that are subject to supervisory consolidation and financial holding companies that are part of an Austrian credit institution group. Its main principles are the winding down of assets or the recovery of a bank without severe impact on its value, the protection of taxpayers and the equal treatment of creditors of a credit institution that is subject to bail-in measures ('no creditor worse off than in insolvency'). The BaSAG provides for all early intervention measures and resolution tools as the BRRD, such as the production of recovery and

resolution plans by institutions, additional supervisory powers for the Austrian Financial Market Authority (FMA) as the national resolution authority to intervene at an early stage and the entrusting of the FMA with necessary resolution powers and tools such as the sale of business or shares, the setting up of a bridge institution, the separation of assets and the bail-in of shareholders and creditors of a failing institution. The BaSAG aims at providing an alternative for credit institutions to standard insolvency proceedings. However, a credit institution can, in parallel, be subject to both resolution measures under the BaSAG and insolvency proceedings under the Insolvency Code. Importantly, the BaSAG modifies the usual ranking of creditors during insolvency proceedings because certain claims (ie, of ensured deposit holders) are satisfied with priority. Payments of subordinated claims will only be made if the first ranking creditors have been fully satisfied.

## Courts and appeals

**5. What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?**

### *Insolvency*

In general, insolvency proceedings are carried out by the competent provincial court (in Vienna, the commercial court) in the area where the debtor conducts its business at the time of the insolvency application or, alternatively, where the debtor has its permanent residence, its branch office or its assets. If a natural person (not operating a business) is applying for insolvency proceedings, the competent district court is involved.

Austrian law distinguishes between three types of court orders:

- those that can be appealed with an autonomous recourse;

- those that can only be appealed together with another appealable decision; and
- those that cannot be appealed at all.

The remedy against court orders in insolvency proceedings is a ‘recourse’, in respect of which the general rules according to the Civil Procedures Act apply.

The requirements for lodging such a recourse are:

- damage (formal damage, meaning that the court’s decision differs from the party’s motion in respect of their claims, is sufficient);
- legitimacy (party status);
- timeliness (14 days, starting from the day of delivery of the court order);
- no waiver or withdrawal of the appeal;
- form; and
- content (declaration of appeal, reason for appeal and claim).

In insolvency matters, the appellant is allowed to bring new facts or evidence during recourse proceedings, provided that these already existed at the time when the appealed order was issued. Recourses do not, in general, have a delaying effect on the enforceability of the initial court order. Furthermore, the appellate court may not alter an appealed decision to the detriment of the appellant. This means that, as a worst-case scenario for the appellant, the recourse is rejected.

If the requirements of a recourse are met, the appellant is entitled to bring an appeal. As a prerequisite to the decision of the appellate court, the trial court where the appeal was submitted decides on the admission of the appeal. After admission, the appeal is submitted to the appellate court, which may also reject

the recourse.

*Restructuring*

In principle, the above should also apply in restructuring proceedings under the Restructuring Code. However, as the Restructuring Code did not come into force until July 2021, there is no relevant case law (including last instance decisions) on procedural queries, including potential challenges or hurdles.

## TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

### Voluntary liquidations

**6. What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?**

Under Austrian law, the term 'voluntary liquidation' of a company is used to refer to a company being dissolved by its shareholders voluntarily according to its corporate charter, outside the scope of insolvency proceedings. In such a case, all creditors' debts must be fully satisfied before the liquidation can be completed.

The following does not deal with voluntary liquidations in the strict Austrian sense of the word, but with the debtor's directors (as opposed to its creditors) voluntarily filing for the opening of insolvency proceedings. Under the Insolvency Code, a debtor is required to file for the opening of insolvency proceedings and, thus, initiate a voluntary liquidation when it is illiquid or (in the case of corporate entities) over-indebted.

Following the application for the opening of insolvency proceedings, the court examines the application and decides whether the insolvency grounds (ie, illiquidity or over-indebtedness) are met. If so, the court will open proceedings immediately.

Once insolvency proceedings have been formally opened, the right to make any

dispositions with respect to the insolvency estate and the administration thereof passes from the debtor to the insolvency administrator appointed by the court (special rules apply to reorganisation proceedings with self-administration). Consequently, as of the opening of proceedings, only the insolvency administrator is entitled to act on behalf of the insolvency estate. Transactions concluded by the debtor after the opening of insolvency proceedings are considered void with respect to the creditors (unless subsequently approved by the insolvency administrator). If the court makes an order for reorganisation proceedings with self-administration, the debtor (or its managing directors) retains the right to administer the insolvency estate. In doing so, the debtor will, however, be supervised by a court-appointed reorganisation administrator and, to a certain extent, the insolvency court.

## Voluntary reorganizations

### 7. What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

*Insolvency*

If the insolvency grounds – illiquidity or over-indebtedness – are met, the debtor may apply for the opening of reorganisation proceedings (with or without self-administration). The same applies in the case of the debtor's pending illiquidity; in other words, if there is a real threat that the debtor will be unable to pay its debts as they fall due. Reorganisation proceedings only bind unsecured creditors (and secured creditors to the extent that their claims are under-secured). If a creditor has filed for the opening of insolvency proceedings over a debtor, the respective debtor may also apply for the opening of reorganisation proceedings, provided that insolvency proceedings have not been formally opened (ie, during the investigation period) in which the insolvency court assesses whether the insolvency grounds are met. An application for the opening of reorganisation proceedings without self-administration must, as a minimum requirement, include a reorganisation

plan, in which the debtor offers payment of at least 20 per cent of the unsecured creditors' claims within the period of two years as of the approval of the reorganisation plan. If reorganisation proceedings are opened, the court will appoint a reorganisation administrator who administers the insolvency estate, including the debtor's business, until the reorganisation plan is approved.

Alternatively, the debtor can apply for reorganisation proceedings with self-administration. In such a case, the reorganisation plan must provide an offer for the payment of at least 30 per cent of the unsecured creditors' claims within the period of two years as of the approval of the reorganisation plan. Furthermore, the debtor must submit, among other things, a detailed inventory of its assets, a current status report and a liquidity plan for a period of 90 days following the filing date. The advantage of reorganisation proceedings with self-administration is that the debtor does not lose control over its assets to an insolvency administrator. The reorganisation administrator's approval is required only for legal acts that are not considered to be in the ordinary course of business. However, if the reorganisation plan is not approved within 90 days of the beginning of the proceedings, self-administration will be revoked and an insolvency administrator will be appointed. During the continuation of the proceedings under the supervision of the insolvency administrator, the reorganisation plan itself can still be approved by the creditors.

The approval of the reorganisation plan results in the conclusion of the reorganisation proceedings and, thus, the termination of the reorganisation administrator's appointment. Most notably, once reorganisation proceedings are concluded, and provided that the approved reorganisation plan will be fulfilled, the debtor is, in principle, relieved of all obligations towards its creditors that exceed the reorganisation quota. Furthermore, as of the conclusion of the reorganisation proceedings, special rules apply to the set-off of creditors' claims; in other words, creditors can only set off their claims in accordance with the reorganisation quota, whereas before the conclusion of proceedings, creditors may have been entitled to set off certain claims in full.

*Restructuring*

If a debtor is neither insolvent nor, in principle, over-indebted, it may initiate the opening of restructuring proceedings under the Restructuring Code. The main purpose of restructuring proceedings is ensuring a viable debtor's continued existence by preventing its (formal) insolvency.

To qualify for restructuring proceedings, the debtor's insolvency needs to be likely, which is, under Austrian law, the case if the debtor's continued existence is threatened without its restructuring (ie, if the debtor falls below certain financial ratios, such as an equity or total capital ratio of more than 8 per cent, or if the debtor's implied debt settlement period exceeds 15 years). As regards the initiation of proceedings, only the debtor is entitled to do so. Creditors cannot initiate restructuring proceedings. The opening of restructuring proceedings requires, in addition to the debtor's likelihood of insolvency, the submission of, among other things, a 'restructuring plan' or 'restructuring concept', which reflects the instruments and tools the debtor will use to push ahead and allow its restructuring, a detailed inventory of assets and a liquidity plan for a period of 90 days following the filing date.

It is expected that restructuring proceedings will, in particular in the course recovering from the effects of the covid-19 pandemic, be used for debt haircuts and fast-track financial restructurings, including the adjustment of payment terms or the remedy of covenant breaches.

## Successful reorganizations

**8. How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?**

*Insolvency*

Under the Insolvency Code, creditors are classified and ranked in order of

priority, with claims of secured creditors ranking first. Secured creditors are creditors that hold a secured right over the debtor's assets (ie, retention of title, lien or mortgage) and, therefore, have claims of separation to receive such assets, or claims of separation to receive the proceeds of the realization of such assets. Preferential claims are ranked second. They include the costs of the reorganisation proceedings, various disbursements of operating costs and expenses, such as claims of employees for regular salary accruing after the opening of the reorganisation proceedings, and remuneration for certain creditors' associations as defined by law. Preferential claims arise after the opening of insolvency proceedings and are to be satisfied before insolvency claims, which rank third. Insolvency claims are the claims of unsecured creditors, which accrued before the opening of proceedings. Insolvency claims need to be filed with the competent insolvency court. Once reorganisation proceedings are concluded, they are, in principle, settled at the quota.

The mandatory features of a reorganisation plan include full satisfaction of all secured and preferential claims, as well as the debtor's offer to pay to all unsecured creditors at least 20 per cent of the outstanding claims within two years of the approval of the reorganisation plan. In the case of reorganisation proceedings with self-administration, the debtor has to offer the payment of a quota of at least 30 per cent (as well as satisfaction in full of all secured and preferential claims).

The reorganisation plan must be approved by unsecured and non-preferential creditors representing more than 50 per cent in value of the total outstanding unsecured, non-preferential debts, as well as the (simple) majority of the creditors (by headcount) that are present at the reorganisation hearing.

Generally, in the reorganisation plan, all unsecured and non-preferential creditors need to be treated equally. Deviations from this principle are possible insofar as a certain class of creditors (which can, therefore, be built) receives less than the other unsecured and non-preferential creditors and the (simple)

majority of these less-favoured creditors (by headcount) approves the less favourable treatment by representing at least 75 per cent of the total outstanding unsecured, non-preferential debts being subject to such a treatment. However, the Insolvency Code does not allow a preferential treatment of certain creditors. Also, it does not foresee the possibility that a reorganisation plan includes releases in favour of third parties.

### *Restructuring*

Under the Restructuring Code, creditors must, in principle, be separated into (if applicable) the following classes:

- secured creditors;
- unsecured creditors;
- bondholders;
- creditors requiring special protection (eg, creditors with claims less than €10,000); and
- subordinated creditors.

However, the requirement to form classes does not apply to small and medium-sized businesses.

A restructuring plan must be approved by at least 50 per cent in number and 75 per cent in value of creditors in each class of creditors. If the required majorities are not achieved in every class, however, the Restructuring Code provides for a cross-class cramdown, provided that the restructuring plan has been, among other things, approved by the majority of the classes of creditors, including the class of secured creditors, and the dissenting class of creditors are treated, in any case, not worse than creditors of equal rank.

Restructuring proceedings are overseen by the courts and, for a restructuring plan to be binding on all affected creditors, including dissenting creditors, court

approval is required.

## Involuntary liquidations

**9. What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?**

### *Insolvency*

Each creditor may apply (individually) for the opening of bankruptcy proceedings (but not reorganisation proceedings) with respect to a debtor. The creditor will need to establish that the debtor is insolvent (ie, either illiquid or, in the case of a corporate entity, over-indebted with a negative going-concern prognosis, although realistically a creditor will usually only be able to demonstrate the former) and that they have a valid claim against the debtor, even if this claim is not yet due for payment. If the insolvency court is satisfied that one or both insolvency grounds are met and the debtor has, in addition, sufficient funds to bear the costs of proceedings, the court will open bankruptcy proceedings immediately. The consequences of the opening of bankruptcy proceedings are, in relation to the creditors, basically the same as if the debtor had initiated proceedings.

### *Restructuring*

Restructuring proceedings under the Restructuring Code cannot be initiated by creditors.

## Involuntary reorganizations

**10. What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?**

*Insolvency*

Only the debtor may file an application for the opening of reorganisation proceedings (with or without self-administration). Creditors may only apply for the initiation of bankruptcy proceedings with respect to a debtor.

*Restructuring*

Restructuring proceedings under the Restructuring Code cannot be initiated by creditors.

## Expedited reorganizations

**11. Do procedures exist for expedited reorganizations (eg, 'prepackaged' reorganizations)?**

*Insolvency*

The Insolvency Code does not provide a specific procedure for 'prepackaged' reorganizations. However, reorganizations may factually be prepackaged; in other words, structured within certain limits beforehand. This may be the case if the offered settlement does not meet the minimum targets (notably, the minimum quota) imposed by law. Therefore, one or several, commonly large, creditors may subordinate their claims for an in-court reorganisation to be concluded successfully.

*Restructuring*

Contrary to the Insolvency Code, the Restructuring Code establishes a specific form of proceedings to expedite (prepacked) reorganizations. These simplified restructuring proceedings are, however, only available in restructurings where exclusively financial creditors are affected.

## Unsuccessful reorganizations

**12. How is a proposed reorganisation defeated and what is the effect of**

**a reorganisation plan not being approved? What if the debtor fails to perform a plan?**

*Insolvency*

A reorganisation plan is rejected if it does not meet the necessary majorities and quorums of the creditors' vote in the reorganisation hearing. Also, in some cases, the insolvency court can, and under certain circumstances has a duty to, reject a reorganisation plan even though it has been approved by the creditors (eg, if statutory provisions, which apply mandatorily, are in breach. For instance, if the reorganisation plan favours certain creditors). If a reorganisation plan has finally failed, reorganisation proceedings are continued as bankruptcy proceedings.

The approved reorganisation plan may, furthermore, be actively monitored by a custodian if agreed upon in the reorganisation plan. During such supervision, the court may issue protective measures regarding the debtor's assets and may veto certain legal transactions.

If a debtor defaults on its payment to a particular creditor as per the approved reorganisation plan, the creditor must notify the debtor of the default in writing by parallelly granting it a two-week grace period. If the debtor is still unable to fulfil its obligations after such a period, the creditor's original claim is re-established on a pro rata basis (accordingly, creditors that have not received any quota payments are entitled to assert their original claims entirely). Despite a default with respect to a particular creditor, the reorganisation plan and the quota remain in effect in relation to those creditors on whom the debtor has not defaulted.

*Restructuring*

If restructuring proceedings fail, the debtor may, if the insolvency grounds are met, initiate insolvency proceedings.

## Corporate procedures

### 13. Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

General company law provides for standard procedures for dissolving a corporation (referred to as 'voluntary liquidation' under Austrian law). Such procedures differ from insolvency proceedings as they do not require any involvement of the court, apart from deleting the corporation from the commercial register. In a voluntary liquidation, all creditors must be fully satisfied.

Once bankruptcy proceedings (but not reorganisation proceedings with or without self-administration) are opened, corporations (including limited liability companies, stock corporations and limited partnerships) are dissolved by operation of statutory law and, in turn, enter into liquidation, which is governed by the Insolvency Code. The corporation's assets thereby form the insolvency estate, which is liquidated to eventually distribute the realized proceeds to the debtor's creditors.

## Conclusion of case

### 14. How are liquidation and reorganisation cases formally concluded?

Insolvency cases are concluded by a formal order of the insolvency court, once all the conditions for the conclusion of the proceedings, such as the approval of the reorganisation plan or the distribution of the insolvency quota following the liquidation of the debtor's assets, have been fulfilled. The same applies, in principle, to restructuring cases.

# INSOLVENCY TESTS AND FILING REQUIREMENTS

## Conditions for insolvency

### 15. What is the test to determine if a debtor is insolvent?

A debtor is deemed to be insolvent when it is either illiquid or (in the case of corporate entities) over-indebted. According to case law, a debtor is illiquid when it lacks the sufficient means (including available credit lines) to pay all of its liabilities due for payment (the debtor's illiquidity is, for example, indicated if it struggles with a liquidity gap of more than 5 per cent regarding liabilities that are due). Liabilities due in the future are thereby generally not taken into consideration. Furthermore, the inability to satisfy liabilities when they are due does not constitute the debtor's illiquidity in terms of the Insolvency Code, if it is only a temporary condition (eg, a result of a momentary cash-flow restriction). A debtor is over-indebted if its assets (based on liquidation values, including hidden reserves and liabilities) are not sufficient to satisfy all of its creditors' claims (irrespective of whether such claims are currently due), and (cumulatively) based on a diligent assessment of the debtor's solvency and economic viability, the debtor's going-concern prognosis reveals that it is likely to become illiquid in the (near) future (negative going-concern prognosis). The first limb of the test (ie, the over-indebtedness status) is objective and will be satisfied if a debtor's liabilities exceed the value of its realizable assets. The second limb of the test (ie, the going-concern prognosis) requires an analysis of the probability that the company will become illiquid within a reasonably predictable period (usually at least the current and the following fiscal year).

## Mandatory filing

### 16. Must companies commence insolvency proceedings in particular circumstances?

The debtor or its managing directors respectively are obliged to initiate insolvency proceedings without undue delay once the insolvency grounds are met. However, if the debtor undertakes promising and realistic measures to stabilize or reverse its insolvency, the debtor may file for the opening of proceedings within a maximum period of 60 days (or, if the debtor's illiquidity is caused by the covid-19 crisis, within 120 days).

## DIRECTORS AND OFFICERS

### Directors' liability – failure to commence proceedings and trading while insolvent

**17. If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?**

In the company's insolvency, the managing directors will be liable to the company if they (willfully or negligently) breach their duties (ie, the duty to file for insolvency), and liable to the company's creditors if they (willfully or negligently) breach statutory provisions that protect the company's creditors. As regards the debtor's existing creditors, the managing directors will be liable to such creditors if and to the extent that the insolvency quota has been reduced owing to their failure to initiate proceedings in due time. In respect of new creditors (ie, creditors who have not had creditor status at the time the debtor became insolvent), the managing directors may, in principle, be liable for the damage such creditors may suffer from entering into a transaction with the debtor who was, at the time of the transaction, already insolvent (fidelity damage).

### Directors' liability – other sources of liability

**18. Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganization actions? Can they be subject to sanctions for other reasons?**

The managing directors of a company are liable to the company for any failure to perform their function with the diligence of a prudent and responsible business person. An example of such a failure would be if the managing directors neglect to convene a shareholders' meeting when the debtor has lost half of its stated share capital. The claims a company may have against its

managing directors are subject to a five-year limitation period and cannot, in principle, be waived.

Apart from the failure to file for insolvency proceedings, managing directors may be held liable under criminal law, for example, for (wilful) preferential treatment of certain creditors (but if the debtor's insolvency has successfully been removed, for instance, because a standstill agreement has been concluded, unequal treatment of specific creditors may be permissible to a certain extent).

Under the Business Reorganisation Act, managing directors may further be personally liable for the company's debt up to €100,000 per individual if they failed to instigate the opening of restructuring proceedings upon receipt of a report by the company's auditor stating that the company is in need of restructuring. Such a need for restructuring would, for instance, be presumed if the company's equity or total capital ratio is less than 8 per cent, and the implied debt settlement period exceeds 15 years. The liability of the managing directors arises if, within two years of the managing directors' receipt of an auditor's report, insolvency proceedings are opened over the company's assets. In certain circumstances, members of the supervisory board or shareholders of a limited liability company may also become liable under the Business Reorganisation Act. Moreover, managing directors may be liable for administrative offenses concerning the company. For example, they can be fined if they (willfully or negligently) breach administrative rules to which the company must adhere. Also, the managing directors' failure to supervise employees in a manner required to prevent the company from such an infringement of administrative rules may result in administrative penalties.

Managing directors may, in addition, be held liable for uncollectible tax claims and social security contributions of the company if they (willfully or negligently) breach their obligations under Austrian tax or social security law. If the managing directors make late or incorrect declarations and payments of taxes (tax evasion) or fail to make pro rata social security contributions on

salary payments, they may also be liable under criminal law.

## Directors' liability – defenses

### 19. What defenses are available to directors and officers in the context of an insolvency or reorganisation?

The defenses available to managing directors primarily depend on the type and stage of the crisis and the respective reorganisation procedures (eg, in-court insolvency proceedings or out-of-court restructurings).

If a company suffers a crisis but the managing directors are not (yet) obliged to file for the opening of insolvency proceedings, there are a number of measures that should, and partially must, be taken to mitigate liability risks.

The managing directors may, for instance, review and potentially increase the level of documentation to demonstrate that they have complied with all their duties. This is of particular importance, as the managing directors may, on the one hand, attempt the company's restructuring where it has already entered into a certain stage of distress, provided that such restructuring efforts are not futile. On the other hand, a (future) insolvency administrator will typically review such transactions and, in particular, the managing directors' conduct in this regard.

Furthermore, managing directors may closely monitor the financial situation of the company to be in a position to anticipate, identify and address potential liquidity risks at an early stage. In this context, under Austrian corporate law, managing directors are obliged to ensure that the company has implemented appropriate internal processes that allow a constant assessment of the company's liquidity situation.

As regards the company's payment behaviour, the managing directors may cancel standing orders for goods and services that are not crucial for maintaining the company's operations. Furthermore, the managing directors

should ensure that any new transactions that are required for the company's business are settled on a delivery-against-payment basis or by way of advance payments.

To comply with their corporate governance duties, the managing directors may also regularly report to the company's shareholders. In the company's crisis, such reports would ideally also include potential reorganisation measures. Depending on the complexity and magnitude of the company's crisis, the managing directors may also seek professional advice from independent third-party financial or legal advisers.

Once insolvency proceedings are opened and certain parties assert claims against the managing directors owing to an alleged breach of duty, the managing directors may defend themselves by referring to 'legitimate alternative conduct'. In such a case, the managing directors would argue that the damage inflicted on the company's creditors owing to the alleged breach of duty would have also occurred if they had complied with all their duties. The burden of proof of such a legitimate alternative conduct is, however, on the respective managing director.

Also, managing directors may take out directors' and officers' insurance, which is intended to protect managing directors against liability claims. Concerning a potential liability of the managing directors under the Austrian Business Reorganisation Law, a managing director may obtain an expert opinion that denies the company's need for restructuring.

## Shift in directors' duties

**20. Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?**

Austrian statutory law does not, in principle, provide for a shift of directors' duties in a company's distress. As a result, the managing directors may

principally proceed to carry out the company's ordinary course of business by applying the diligence of a prudent and reasonable business person. If the company becomes illiquid or over-indebted, however, the managing directors must file for the opening of insolvency proceedings without undue delay. If they fail to do so, they will be liable for any resulting damages. The Restructuring Code, nevertheless, stipulates that in the likelihood of insolvency, directors must have due regard to, among other things, the interests of creditors, which may prima facie be understood as a potential shift of directors' duties. However, in the legislative materials to the Restructuring Code it is clarified that the provision neither stipulates a hierarchy among the different parties (including creditors) whose interests need to be given due regard, nor does it establish a (new) basis of directors' liability.

## Directors' powers after proceedings commence

### 21. What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

*Insolvency*

After the formal opening of insolvency proceedings, the right to manage the company's business and dispose of its assets passes to the insolvency administrator. As a result, only the administrator may represent the insolvency estate and, thus, the company going forward. An exemption to this principle is reorganisation proceedings with self-administration. In such proceedings, the debtor's managing directors may, under the supervision of a court-appointed reorganisation administrator, continue to administer the insolvency estate. The reorganisation administrator can thereby object to any management action, including transactions or disposals within the ordinary course of the company's business. Management actions that go beyond the ordinary course of the company's business need to be approved by the reorganisation administrator and, in certain cases, also by the insolvency court. Actions that need the

reorganisation administrator's approval include the termination of employment contracts and lease agreements or the decision about whether a mutual agreement not yet fulfilled by either party must be adopted or rejected. Furthermore, specific actions, such as the right to challenge preferential transactions the debtor entered into before the opening of insolvency proceedings or the examination of insolvency claims, are exclusively reserved to the reorganisation administrator.

*Restructuring*

Restructuring proceedings under the Restructuring Code are designed as debtor in possession proceedings. Thus, the debtor's directors remain, in principle, in control of the debtor's assets and the day-to-day operation of its business. If the court deems it necessary to safeguard the interest of creditors, however, it can appoint a restructuring administrator. Furthermore, if the restructuring plan involves, among other things, a general stay of individual enforcement actions or a cross-class cramdown, the appointment of a restructuring administrator is mandatory.

## MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

### Stays of proceedings and moratoria

**22. What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganizations? In what circumstances may creditors obtain relief from such prohibitions?**

The Insolvency Code imposes an automatic stay on civil proceedings once insolvency proceedings are formally opened. As a result, legal disputes concerning the debtor's assets can no longer be filed and pending lawsuits will be suspended. Claims against the debtor that arose before the opening of insolvency proceedings must be filed with the insolvency court (insolvency claims). The filed claims will then be examined by the insolvency

administrator, who may either accept or reject each claim. If the insolvency administrator rejects a claim, the respective creditor may need to initiate proceedings against the insolvency estate for their claim to be further considered.

As regards civil proceedings that were already pending when the insolvency proceedings were opened, the insolvency administrator may choose whether they will continue such proceedings.

## Doing business

### 23. When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

*Insolvency*

During reorganisation proceedings with self-administration, the debtor may, in essence, carry on its business. Reorganisation proceedings with self-administration are typically opened if the debtor has applied for self-administration, has provided the required information and annexes (eg, a reorganisation plan offering a minimum quota of 30 per cent of the unsecured claims as well as a current status report and a liquidity plan), and if there are no circumstances that lead to the expectation that self-administration would disadvantage the debtor's creditors (these prerequisites apply cumulatively).

Creditors that supply goods and services after the opening of proceedings are treated as priority creditors of the insolvency estate. As regards mutual contracts the debtor entered into before the opening of proceedings, which have, as of the opening of proceedings, not yet been fulfilled by either party, the administrator (or in reorganisation proceedings with self-administration the debtor, subject to the approval of the reorganisation administrator) may choose to rescind or fulfil such contracts. If the administrator decides to fulfil such

contracts, the claims arising out of them establish preferential claims. If, however, the administrator chooses to rescind from such contracts, the claims arising out of the rescindment, including damage claims, are treated as insolvency claims. Furthermore, contractual termination rights that are exclusively grounded in the opening of insolvency proceedings over the debtor's assets may be invalid. Only certain financial and derivative contracts, which are usually entered into under master agreements that provide for a mutual set-off of claims (close-out netting), are exempted from this rule.

If certain contracts or business relationships are essential for the debtor's continuation of business during the insolvency proceedings, the corresponding creditors' termination rights may, in addition, be limited for a six-month period as of the opening of proceedings. In such cases, creditors may only exercise their termination rights for 'good cause'. A deterioration of the economic situation of the debtor or payment defaults before the opening of proceedings do not, however, establish a good cause. To participate in the proceedings, creditors need to file their insolvency claims with the competent insolvency court. The filed insolvency claims will be examined by the insolvency administrator. Depending on the complexity of proceedings, the court may also appoint a creditors' committee, which represents the creditors within the proceedings. The main objective of the creditors' committee is to support and supervise the insolvency administrator. Moreover, certain transactions, such as the sale of the debtor's business, need to be approved by the creditors' committee.

Importantly, if the debtor has submitted a reorganisation plan, the creditors vote on the approval of the plan and, thus, on the debtor's reorganisation itself.

The insolvency court in turn opens and terminates insolvency proceedings, issues court orders and holds the respective court hearings. It also supervises the insolvency administrator and approves certain transactions, such as the sale of the debtor's business.

*Restructuring*

In restructuring proceedings, special treatment may apply to creditors that are subject to a stay of individual enforcement actions and whose claims came into existence before the stay and have not been paid by the debtor. Affected creditors, including those who deliver services or goods, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts that fall due during the stay.

## Post-filing credit

**24. May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?**

*Insolvency*

In reorganisation proceedings without self-administration (and, in theory, in bankruptcy proceedings), the insolvency administrator can, in principle, enter into loan or other credit agreements to secure the necessary financing for the continuation of the debtor's business. Such liabilities incurred by the insolvency administrator are generally treated as preferential claims (ie, they rank 'super senior').

In reorganisation proceedings with self-administration, the debtor's managing directors may, under the supervision of the reorganisation administrator, continue to manage the insolvency estate. Transactions that go beyond the ordinary course of the debtor's business must, however, be approved by the reorganisation administrator and, in certain cases, by the insolvency court. Provided that such approvals (if applicable) are duly obtained, the managing directors may take out a loan or credit to finance the debtor's business continuation. Claims arising out of such loan agreements are, in principle, treated as preferential claims.

*Restructuring*

In restructuring proceedings, the debtor can request the court to approve new or interim financing (ie, financial assistance to support the debtor's operation of the business during restructuring negotiations or the implementation of the restructuring plan after its confirmation). Given the court's approval, new or interim financings are only subject to limited avoidance actions, which seek to declare such financing void, voidable or unenforceable as an act detrimental to the general body of creditors in the context of subsequent insolvency procedures.

## Sale of assets

**25. In reorganizations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?**

*Liquidations*

In insolvency proceedings, the sale (or lease) of certain assets, including immovable assets, is subject to the prior approval of the creditors' committee and the insolvency court. Also, the envisaged sale of such assets needs to be publicly announced at least 14 days (or in urgent cases, eight days) in advance. The same applies to the sale (or lease) of the debtor's entire business, including the sale of the debtor's controlling share in the business and the debtor's entire or material movable assets (whether fixed or current assets). The debtor needs to be heard before the insolvency administrator concludes such transactions. In practice, the debtor's assets are commonly sold in a private, out-of-court sale. Provided that such sales take place within pending insolvency proceedings, the general statutory warranty provisions regarding the transfer of liabilities upon the purchase of a business, including social security and tax liabilities, do not apply (however, specific assets may be affected by certain encumbrances,

which may only lapse upon bona fide acquisition of ownership of the assets).

*Reorganizations*

In reorganisation proceedings with self-administration, all transactions that go beyond the debtor's ordinary business are subject to the reorganisation administrator's prior approval. In respect of a sale (or lease) of the above-mentioned assets, the additional approval of the creditors' committee and the insolvency court is required.

Also, in reorganisation proceedings, the general statutory provisions regarding the transfer of liabilities upon the purchase of a business do not apply. One exception of this principle, however, is a potential transfer of employment contracts, provided that the debtor's entire business (or parts thereof) is sold within reorganisation proceedings with self-administration.

## Negotiating sale of assets

**26. Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?**

*Liquidation*

In insolvency proceedings, the insolvency administrator is permitted to negotiate an interim sale agreement with one party, while continuing to seek better bids. In practice, however, such 'stalking horse' bids do not seem to be too relevant, as the insolvency administrator typically aims to obtain the best possible price. Therefore, they would usually initiate a transparent auction process. This applies to reorganisation proceedings as well.

In insolvency proceedings, or more precisely, in bankruptcy proceedings, Austrian insolvency law does not, in principle, permit credit bidding, as unsecured creditors are entitled to the insolvency quota only (this is referred to as the 'principle of equality between creditors'). Thus, the insolvency court would have no discretion to assess such credit biddings (consequently, the

credit bid of an assignee of the original secured creditor would not be permitted either). With respect to secured creditors (only), an economically similar result can, however, be achieved in cases where a secured creditor acquires assets from the insolvency estate and the claims of the insolvency estate resulting from such asset purchases are set off against the claims of the secured creditor against release of collateral.

*Reorganizations*

In reorganisation proceedings, credit bidding may be permissible if it is part of a reorganisation plan, provided that the credit bid does not result in preferential treatment of a certain creditor. If, owing to the credit bid, a certain class of creditors (which can, therefore, be built) would receive less than other unsecured creditors and these unprivileged creditors approve their less favourable treatment, a credit bid could, in principle, be accepted

## Rejection and disclaimer of contracts

**27. Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?**

In insolvency proceedings, mutual contracts that have, as of the opening of proceedings, not been fulfilled by either party may be terminated, unless the insolvency administrator (or in reorganisation proceedings with self-administration the debtor subject to the administrator's consent) chooses to adopt it. Lease contracts where the debtor is the tenant can, furthermore, be terminated in accordance with the statutory notice period, irrespective of the agreed contractual term. Employment contracts with the debtor being the employer may, in essence, be terminated within one month of the insolvency court ordering the closing of the debtor's business (or parts thereof). In

reorganisation proceedings with self-administration, the reorganisation administrator would need to approve such terminations. In practice, a reorganisation administrator would typically grant approval if the continued existence of the contract would jeopardize the continuation of the debtor's business during the proceedings and, eventually, the conclusion of the reorganisation plan.

If the insolvency administrator chooses to rescind from mutual contracts that have, as of the opening of proceedings, not been fulfilled by either party, the respective counterparty may claim damages based on such rescindments. This also applies to the termination of lease and employment contracts. However, such damage claims would typically constitute insolvency claims. If admitted by the insolvency administrator, such insolvency claims are settled at the quota. If the insolvency administrator decides to adopt such contracts, they must comply with the obligations thereunder. Claims arising from such adopted contracts are usually preferential claims, which are settled in full before insolvency claims.

## Intellectual property assets

**28. May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?**

In general, Austrian insolvency law does not provide specific procedures regarding intellectual property (IP) rights (with certain provisions in special laws, such as the Copyright Act, being an exception). Consequently, the general provisions regarding mutual contracts apply to IP contracts. Accordingly, contractual termination rights in IP contracts that are exclusively grounded in the opening of insolvency proceedings may generally be void. Furthermore, if the use of the relevant IP rights is essential for the debtor's continuation of business during the proceedings, the respective counterparty's ordinary termination rights may also be limited for a six-month period as of the

opening of proceedings. If licence agreements have not yet been fulfilled by either party, the administrator (or in reorganisation proceedings with self-administration, the debtor with the consent of the administrator) may choose whether they wish to adopt or rescind from such agreements. In the case of an adoption, the contractual obligations of both parties remain intact and must be fulfilled in full (the court may set a deadline for the insolvency administrator to declare whether they wish to adopt the agreement; the deadline, however, must not be set earlier than three days after the examination hearing).

## Personal data

**29. Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?**

Data processing activities during insolvency proceedings are governed by Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation or GDPR) and the Austrian Data Protection Act 2018, which complements the GDPR using various opening clauses.

Under the GDPR, the debtor's obligation to disclose any necessary information to the insolvency administrator must not infringe the data subject's right to protection of personal data. Accordingly, the insolvency administrator is required to safeguard the interests of the relevant data subject, for example, the respective interests of the debtor's employees or customers. Provided that the debtor has lawfully processed the data to be disclosed, the disclosure of non-sensitive data can be justified based on the legitimate interests pursued by the controller or by a third party, except where overriding interests of the data subject exist. The disclosure of sensitive data, including data relating to a natural person's race, political opinion, trade union membership, religion,

health or sexuality can, however, only be justified by the data subject's explicit consent.

In practice, data protection rules are especially relevant when the debtor's assets, including its customer base, are sold during insolvency proceedings. In such cases, any transfer of personal data must comply with the rules set out in the GDPR (this applies to potential preceding due diligence procedures as well).

## Arbitration processes

**30. How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?**

Under Austrian insolvency law, the insolvency court has the sole and exclusive jurisdiction to hear the subject matter of any insolvency case (including the opening of insolvency proceedings, the appointment of the insolvency administrator and the conclusion of proceedings). Any related choice of forum clauses in pre-insolvency arbitration agreements would, therefore, be void. Claims for segregation or separation of certain assets from the insolvency estate and claims arising from mutual contracts not yet fulfilled by either party are arbitrable. If the insolvency administrator chooses to adopt a mutual contract that has not yet been fulfilled by either party, they would, in addition, be bound by an arbitration agreement contained therein. Furthermore, once insolvency proceedings are opened, the insolvency administrator may enter into arbitration proceedings with respect to voidance claims. If arbitration proceedings were already pending before the opening of insolvency proceedings, the arbitration procedures would be continued if the insolvency administrator chooses to (further) contest these claims.

## CREDITOR REMEDIES

## Creditors' enforcement

### 31. Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

The opening of insolvency proceedings imposes an automatic stay on unsecured creditors initiating or continuing civil proceedings against the debtor, so that lawsuits regarding the debtor's assets can no longer be filed and pending lawsuits are suspended. Instead, unsecured creditors need to file their insolvency claims with the insolvency court. Secured creditors are, by contrast, not affected by such an automatic stay, so they may enforce their rights against the debtor irrespective of the insolvency proceedings (eg, segregation rights, including the retention of title or mortgages over the debtor's immovable properties).

Furthermore, out-of-court enforcement may be theoretically possible if certain assets have been released from the insolvency estate by court order (in practice, however, such proceedings are hardly relevant, as the insolvency court would usually not release any assets of value).

## Unsecured credit

### 32. What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Outside the debtor's insolvency, unsecured creditors need to obtain a court judgment (or conclude an enforceable notarial deed) to enforce their claims against the debtor. After obtaining such a judgment, they can initiate judicial executions, which are governed by the Austrian Enforcement Code. These proceedings can, however, be difficult and time-consuming, in particular if an application for the compulsory creation of a mortgage over the debtor's real property or a forced administration or sale of real property is involved.

Additionally, unsecured creditors typically direct their enforcement acts against receivables, rights and any other movable assets of the debtor.

## CREDITOR INVOLVEMENT AND PROVING CLAIMS

### Creditor participation

**33. During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?**

*Insolvency*

In principle, orders issued by the insolvency court, including the decision to open and terminate proceedings, are published at a publicly available electronic register, available on the Federal Ministry of Justice website. After the opening of insolvency proceedings, the insolvency court will hold several hearings, which the debtor's managing directors need to attend. These hearings include:

- the first creditors' meeting, which is typically scheduled within one to three weeks after the opening of proceedings;
- the examination hearing, where the insolvency administrator acknowledges or rejects the filed insolvency claims. If the insolvency administrator rejects a claim, the respective creditor must commence legal proceedings to obtain a decision on the claim's validity;
- the report hearing, where the insolvency administrator reports on the status of the proceedings, including a statement on whether the continuation of the debtor's business may reasonably be further pursued. If the continuation of business would, in the insolvency administrator's view, lead to a potential increase of the creditor's losses, the administrator would typically propose the closing of the

debtor's business (or parts thereof). Furthermore, the administrator would report on the reorganisation plan, if any, including a statement on whether they deem the reorganisation plan appropriate and viable. The report hearing needs to be held within the first 90 days after the opening of insolvency proceedings. It can generally be combined with the examination hearing or even held at the very beginning of the proceedings instead of the first creditors' meeting; and

- if the debtor has submitted a reorganisation plan, the reorganisation plan hearing, where the creditors vote on the reorganisation plan.

At the end of the proceedings, the insolvency administrator must give a statement of accounts.

Further meetings can be held at the insolvency court's discretion or if requested by the insolvency administrator, the creditors' committee or at least two creditors representing claims of at least one-quarter of the total claims (secured and unsecured) against the debtor. All meetings are called by the insolvency court and published on the Federal Ministry of Justice website.

Upon final confirmation of the reorganisation plan, the debtor is released from its liabilities in accordance with the reorganisation plan. However, reorganisation plans may not provide for the release of liabilities owed by third parties. Therefore, while the debtor may also be released from its liabilities towards jointly liable parties (eg, guarantors), all such jointly liable parties will remain liable to the debtor's creditors.

If the debtor is in default of its payment obligations under the reorganisation plan, the original liabilities may be reinstated provided that the creditor has given due and timely notice of the default. In principle, the liabilities are reinstated proportionally (ie, if 75 per cent of the insolvency quota has already been paid, 25 per cent of the original liability will be reinstated). Thus, provided that the quota pertaining to a certain liability has been paid in its

entirety according to the reorganisation plan, the original liability will not be reinstated. In general, the reorganisation plan may not deviate from this provision to the detriment of the debtors. If the reorganisation plan is annulled in its entirety, different rules apply.

### *Restructuring*

As regards restructuring proceedings under the Restructuring Code, a peculiarity applies in simplified restructuring proceedings. In principle, these are private and therefore not published with the electronic register. At the time of writing, it is still unclear whether simplified proceedings can, if requested by the debtor, be published on the Federal Ministry of Justice website, which would allow (cross-border) recognition in the European Union.

## Creditor representation

**34. What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?**

The insolvency court must appoint a creditors' committee, consisting of three to seven members, if the particular features of the case indicate that such a committee is necessary (eg, if the debtor's business or main assets are to be sold within the proceedings). In practice, a creditors' committee is typically appointed in large-scale or more complex insolvency cases. Furthermore, it usually consists of the creditor protection associations (and, in certain cases, of major creditors, for example the debtor's principal banks).

The creditors' committee's main purpose is to supervise and support the insolvency administrator (including periodic reviews of the insolvency administrator's management of funds). Furthermore, the creditors' committee needs to approve certain transactions, such as a sale or lease of the debtor's business or the debtor's main assets.

Members of the creditors' committee may not claim any remuneration beyond the compensation of their expenses, such as travelling expenses.

## Enforcement of estate's rights

**35. If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?**

A prerequisite for the opening of insolvency proceedings is sufficient funds to cover the proceedings' cost. If the insolvency court determines that the debtor's assets, including, among others, receivables and immovable property, are insufficient to cover such costs, it can either dismiss the insolvency application or, if the debtor is a legal entity, oblige the debtor's managing directors or majority shareholders to advance funds for cost coverage.

Once insolvency proceedings have formally been opened, only the insolvency administrator is entitled to initiate or continue claims on behalf of the insolvency estate. If the insolvency administrator lacks sufficient funds to pursue a claim, they may apply for legal aid. If (certain) creditors are, however, able to advance the costs of such claims and would, in addition, benefit from such claims owing to a potential increase in their quota, the court will typically not grant legal aid. If such creditors are, nevertheless, not willing to finance the proceedings, the administrator can enter into a loan agreement so that they can pursue the claims. Notably, in a judgment on 17 June 2019 (17 Ob 6/19k), the Austrian Supreme Court of Justice overruled the prevailing opinion of legal scholars and confirmed that the insolvency administrator may validly assign and transfer insolvency-related voidance claims within proceedings. In this particular case, an Austrian liability company entered into a purchase agreement, pursuant to which the wife of the company's shadow managing director purchased three properties. Shortly after the conclusion of the purchase agreement, insolvency proceedings were opened over the limited liability company. Under the Insolvency Code, the purchase agreement may be voidable

owing to the intention to discriminate against the company's creditors. However, because of a lack of funds, the insolvency administrator could not conduct these proceedings on behalf of the insolvency estate, so he sold and assigned the related claims, including voidance claims, to an unrelated third-party buyer. Owing to the related litigation risks, the purchase price, in this case, amounted to €5,000, whereas the market value of the three properties was approximately €470,000. Notably, irrespective of the significant difference between the purchase price and the market value of the properties, the Supreme Court of Justice confirmed the validity of the assignment.

## Claims

**36. How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognized? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?**

After the opening of insolvency proceedings, creditors need to file their insolvency claims with the insolvency court. The deadline for such filings is established by the insolvency court in its opening order. Generally, it ends 14 days before the examination hearing, which takes place within 60 to 90 days of the opening of proceedings. Claims can, in principle, also be filed after this deadline, provided that the insolvency proceedings are still pending. These claims are, however, subject to certain limitations (eg, creditors of such claims cannot appeal other claims that have been filed in time).

Generally, each filing must include a statement on the basis, the amount and the rank of the respective claims. To put the insolvency administrator in a position to examine the claims, the filing should also comprise information evidencing or supporting the claim (eg, the respective invoices, which can be attached to the filing).

Contingent claims can be filed with their complete amounts. However, the quota relating to such claims need to be secured and, in cases of suspensive conditions (ie, where the claim arises only after a certain condition has been met), only paid to the creditor after the relevant condition has in fact been met. In the case of resolutive conditions (ie, where an existing claim is extinguished when a certain condition has been met), the quota relating to such claims may either be secured or ordinarily paid to the creditor, provided that the creditor provides a security for the quota to be paid back if the resolutive condition is met. The filing of non-liquidated claims or claims denominated in foreign currencies must provide an estimate by the creditor of the claim's fair value, which the administrator may challenge. Claims acquired at a discount can be filed for their full-face value. However, setting off claims against the insolvency estate with claims a creditor has acquired after the initiation of insolvency proceedings (and under certain circumstances when the third party knew or ought to have known of the insolvency of the common debtor, even before the initiation of insolvency proceedings) is not permitted. Interest accruing from the date of the opening of insolvency proceedings cannot be claimed as an insolvency claim during the proceedings. However, the opening of reorganisation proceedings does not stop interest from accruing, unless the parties agree on a discharge of residual debt during the course of such proceedings.

A special set of rules applies to shareholder loans granted during a debtor's financial crisis. Provided the lender had, at the time of the credit granting, either a controlling stake in or influence on the company, or a participation in the debtor of at least 25 per cent, these shareholder loans are deemed to be equity substituting and, thus, subordinated by statutory law. Such subordinated claims can only be filed if ordered by the insolvency court. The insolvency court will typically issue such an order if it expects that subordinated claims may (partially) be satisfied.

At the examination hearing, the insolvency administrator accepts or rejects

each of the filed claims. Provided that no other creditor has disputed the validity or priority of such claims, the insolvency administrator's confirmation of the claims has, in relation to the creditors, a binding effect, meaning that they can enforce their claims after the termination of proceedings by way of execution, just as under any other execution title. Creditors whose claims are rejected by the insolvency administrator or have been contested by other creditors must commence legal proceedings to have the validity of their claims admitted by way of a court decision.

All insolvency claims that have been accepted by the insolvency administrator (or, following legal proceedings, admitted by way of a court decision) rank pari passu.

## Set-off and netting

**37. To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?**

*Insolvency*

In general, creditors may exercise their rights of set-off and netting in pending insolvency proceedings, provided that the claims to be compensated were mutual at the time of the opening of proceedings. A creditor may not, however, set off a claim that arose before the formal opening of insolvency proceedings if they knew, or should have known, of the debtor's illiquidity. Importantly, as opposed to the general rules of civil law, claims that were not due at the time of the opening of insolvency proceedings, as well as claims that are subject to a condition, may also be set off in pending insolvency proceedings. Creditors are not obliged to make use of their rights of set-off. However, if they choose not to exercise these rights in the pending proceedings, they may, after the termination of proceedings, only off-set their claims against the reorganisation plan quota, insofar as such a reorganisation plan has been concluded. Special

netting rules apply under the Financial Collateral Act.

*Restructuring*

In principle, the above also applies in restructuring proceedings under the Restructuring Code, unless the restructuring plan has provided for deviating procedures.

## Modifying creditors' rights

**38. May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?**

In general, all insolvency claims that have been accepted by the insolvency administrator (or, following legal proceedings, admitted by way of a court decision) rank pari passu, with claims of secured creditors, preferential claims and subordinated claims being the exception. Preferential claims enjoy priority, whereas subordinated claims rank junior to insolvency claims. Claims of secured creditors are, to the extent of the respective security rights, not affected by the insolvency proceedings.

The insolvency court may not change the rank and priority of the creditors' claims.

Only if the insolvency administrator challenges the claim of a particular creditor may the court decide that the creditor's claim is, in fact, different in nature from that alleged by the creditor. The administrator may then assign it to a different class, thereby also changing its priority. However, this happens infrequently and is most likely based on the question of whether a claimed security is valid. If the insolvency court in such proceedings concludes that the security is, in fact, valid, the claim would be classified as a secured creditor's claim, so that it would not, to the extent of the respective security right, be affected by the insolvency proceedings.

## Priority claims

**39. Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganizations? Which have priority over secured creditors?**

In essence, preferential claims are:

- the costs of the insolvency proceedings;
- the disbursement of expenses for the insolvency estate's maintenance and management;
- certain early termination claims;
- claims for fulfillment of mutual contracts (provided that the insolvency administrator has adopted such contracts); and
- the remuneration of certain creditors' associations that participate in the proceedings.

Claims accrued before the opening of the proceedings (including taxes, social security contributions, wages and salaries) are not privileged.

Secured creditors' claims are not affected by the insolvency. However, if the enforcement of such rights threatens the continuation of the insolvent's business, the satisfaction of such claims may be postponed for a period of six months after the beginning of the insolvency proceedings. Post-opening claims are not satisfied from valid security rights of a creditor (with the exception of costs having arisen specifically with respect to the disposal of the security).

## Employment-related liabilities

**40. What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)**

In general, ordinary wages and salary payments accrued before the opening of insolvency proceedings are deemed to be insolvency claims, whereas such payments accrued after the opening of insolvency proceedings are preferential claims and rank senior. Generally, in insolvency proceedings, the administrator performs the rights and duties of the employer and therefore is solely entitled to hire employees or to terminate employment contracts. Reorganisation proceedings with self-administration are, however, exempted, as in such proceedings the debtor may, with the consent of the reorganisation administrator, continue to perform these duties.

Furthermore, the Insolvency Code provides special terminate rights (preferential termination rights), which allow the administrator (or in reorganisation proceedings with self-administration, the debtor with the consent of the reorganisation administrator) to preferentially terminate employment relationships:

- within one month of the public announcement of the closure of the debtor's business or parts thereof;
- within one month of the report hearing (unless the insolvency court issued an order pursuant to which the debtor's business should be continued);
- during the fourth month after the opening of the insolvency proceedings if no report hearing was held and no order to continue the debtor's business has been announced in the insolvency register; and
- in reorganisation proceedings with self-administration, within one month of the opening of proceedings, insofar as maintaining certain employment relationships would jeopardize the reorganisation.

Furthermore, employees may terminate the employment relationship by early resignation for good cause, and the opening of insolvency proceedings is deemed such a cause. If employment relationships are terminated by way of a

preferential termination, the statutory or, if applicable, the collective notice periods apply (contractually agreed longer notice periods or specific termination dates would, by contrast, be irrelevant). In addition, the claims arising from such preferential terminations (eg, severance pay, holiday compensation, compensation for dismissal if longer notice periods or specific termination dates were contractually concluded) would establish insolvency claims, which are settled at the insolvency quota, whereas claims arising from 'regular' terminations would generally constitute preferential claims.

Under Austrian law, the entitlements of employees involved in insolvency proceedings are, up to certain amounts, protected by the Insolvency Compensation Fund, which was established for the benefit of employees in the event of the employer's insolvency. Therefore, the employees need to register their claims with the Fund, which will then assert such claims against the insolvency estate (however, the involvement of the Fund has no effect on the qualification of a claim as an insolvency or preferential claim).

Also, Austrian labour law provides for a number of information and notification obligations in the event of mass redundancies, including the obligation to notify the local office of the Austrian Public Employment Service in writing if:

- in businesses with more than 20 and less than 100 employees: at least five employees are to be terminated;
- in businesses with 100 to 600 employees: at least 5 per cent of all employees are to be terminated;
- in businesses with more than 600 employees: at least 30 employees are to be terminated; and
- at least five employees aged 50 or higher are to be terminated.

Such notifications need to be signed by the works council and must be

submitted at least 30 days before the termination notices are issued, as the termination would otherwise be void.

Furthermore, if the debtor's business or parts thereof are transferred in reorganisation proceedings with self-administration, the Austrian transfer-of-business rules may apply, pursuant to which employment relationships may, under certain conditions, automatically and by operation of law transfer to the transferee of the business. Consequently, all individual rights and obligations (including salary payments) would be maintained.

## Pension claims

### 41. What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

*Direct pension promises*

If an employee is entitled to receive a pension payment directly from their employer (a direct pension promise) and the insolvency proceedings are opened during an employee's pay-out phase (ie, following the employee's retirement), the retired employee is entitled to a maximum of six-monthly pension payments before the effective date (ie, the opening of insolvency proceedings); for outstanding pension payments after the effective date, benefits securing entitlements and pension, severance and settlement amounts are capped at a maximum of 24 months, or up to 12 months if the pension promise is not subject to the Austrian Company Pension Act. Such claims will be covered by the Insolvency Compensation Fund, established solely for the benefit of employees in the event of the employer's insolvency. Deficiencies accrued before the opening of insolvency proceedings are deemed to be unsecured insolvency claims, whereas deficiencies accrued after the opening of insolvency proceedings establish preferential claims, which are satisfied before insolvency claims.

If an employee is entitled to a direct pension promise and the insolvency proceedings are opened before an employee's pay-out phase, and the employment relationship is terminated as a result of the insolvency, the employee is entitled to vested benefits and rights. The vesting amount is covered by the Insolvency Compensation Fund up to pension, severance or settlement amounts of 24 months.

### *Pension fund schemes*

If an employee is entitled to receive pension payments from a third-party pension fund, the claims of both active or retired employees against third-party pension funds are not affected by the employer's insolvency. Unpaid employer contributions (for active employees) are deemed to be current wages, so for the period before the opening of insolvency proceedings they are insolvency claims, and for the period thereafter, they constitute preferential claims that will be satisfied before the insolvency claims. Until the termination of employment, employer contributions are covered by the Insolvency Compensation Fund.

A retired employee's claim for an additional payment into the occupational defined-benefit pension plan, if any, qualifies as an insolvency claim, as this claim arose before the insolvency proceedings were opened.

## Environmental problems and liabilities

**42. Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?**

After the initiation of insolvency proceedings, public regulations, including environmental regulations, continue to be relevant for the affected parties. Accordingly, the debtor's obligation to take all necessary measures regarding environmental requirements persists. Because the insolvency administrator

takes over all duties related to the insolvency estate, the administrator also represents the debtor in dealing with the authorities, including with respect to environmental matters.

Where the relevant requirements are not met, the public authority may initiate substitute performance. Costs arising as a result and after the initiation of insolvency proceedings are preferential claims and are, therefore, incurred to the detriment of the general insolvency creditors.

## Liabilities that survive insolvency or reorganisation proceedings

### 43. Do any liabilities of a debtor survive an insolvency or a reorganisation?

*Insolvency*

***Reorganisation***

If the debtor is reorganized by way of a reorganisation plan that has been approved by the insolvency court, the liabilities of the debtor only survive if, and to the extent that, they have been admitted to the reorganisation plan. In principle, this also applies to claims of creditors who have voted against the reorganisation plan or who have not participated in the proceedings at all (ie, if they have not filed their claims), unless their non-participation results from the debtor's negligence or intent (the reorganisation plan does not affect preferential claims, but if such claims are not fully satisfied, the insolvency court must not approve the reorganisation plan).

If the debtor's obligations under the reorganisation plan are entirely fulfilled (eg, if the creditors have received their respective quota payments), the debtor is, in relation to its creditors, released from its debts. If the debtor is, by contrast, in default of its obligations under the reorganisation plan, the original liabilities may be reinstated, provided that the creditor has given due and timely notice of the default. In principle, the liabilities are reinstated proportionally

(ie, if 75 per cent of the insolvency quota has already been paid, 25 per cent of the original liability will be reinstated).

In cases where the debtor's business is sold by way of an asset deal during pending proceedings, the general set of rules concerning such transactions is, in principle, not applicable, so that a purchaser should generally not be liable for the insolvent's debts.

***Liquidation***

If the debtor is a commercial entity and the insolvency proceedings lead to a liquidation of the debtor (eg, if the creditors voted against the reorganisation plan), the debtor would, once insolvency proceedings are terminated, cease to exist and thus be deleted from the commercial register (unless assets of the debtor emerge, in which case the debtor would be deemed to continue in existence). In liquidation scenarios, proceedings are terminated when all assets of the debtor have been realized and the related proceeds have been distributed among the admitted creditors.

*Restructuring*

Where a debtor uses a restructuring plan under restructuring proceedings to reorganize, the terms of the restructuring plan will determine the treatment of the debtor's liabilities (eg, the extent to which they are compromised and the extent to which they will survive).

## Distributions

### 44. How and when are distributions made to creditors in liquidations and reorganizations?

*Insolvency*

***Reorganisation***

In reorganisation proceedings, payments are made in accordance with the

approved reorganisation plan.

***Liquidation***

After the examination hearing, the insolvency administrator may make distributions whenever there is sufficient cash in the insolvency estate, provided that they have heard the creditors' committee and obtained the consent of the insolvency court to the respective distribution. Subject to security deposits, this also applies in cases where proceedings regarding the validity of certain claims are pending (ie, if the insolvency administrator has rejected a creditor's claim and the creditor has commenced proceedings).

After the debtor's assets have been entirely liquidated and the insolvency court has issued its final orders (ie, on the pending proceedings regarding the validity of the disputed claims and the overall costs of proceedings, including the insolvency administrator's fees and expenses), the insolvency administrator needs to prepare a draft distribution document, which they will then submit to the insolvency court. Following the distribution hearing, the final distribution will be made in accordance with the approved distribution document.

*Restructuring*

In the case of a restructuring under the Restructuring Code, the terms of any distribution, including the time or date of the respective distribution will usually be set out in the restructuring plan.

## SECURITY

### Secured lending and credit (immovables)

**45. What principal types of security are taken on immovable (real) property?**

The two principal types of security available for immovable property are mortgages and the transfer of title in property. In a mortgage, the debtor

remains the owner. In a transfer of title in property, the transferee is registered as the owner but merely holds the property as a trustee for the transferor.

Both types of security are valid only when registered with the land register. The priority of one of several mortgages on the same piece of immovable property usually depends on the chronological order and thus the 'rank' of the entry into the land register.

### Secured lending and credit (movables)

**46. What principal types of security are taken on movable (personal) property?**

The principal types of security available for movable property are pledges and transfers of title for the purpose of establishing a security. In practice, assignments of receivables as a security device are particularly common. However, for such assignments and pledges to be effective as regards third parties, strict publicity requirements must be complied with. For example, for receivables, by notification of the assignment to the third-party debtor or, alternatively, by appropriate notes in the assignor's accounts from which it is readily ascertainable when and in whose favour the assignment was made. The priority of a pledge or assignment depends on when the publicity requirement was met.

## CLAWBACK AND RELATED-PARTY TRANSACTIONS

### Transactions that may be annulled

**47. What transactions can be annulled or set aside in liquidations and reorganizations and what are the grounds? Who can attack such transactions?**

Once insolvency proceedings have been opened, only the administrator may initiate voidance actions in relation to transactions the debtor has undertaken before the opening of proceedings, whereby the decision on whether the

challenged transaction is void lies within the insolvency court.

To commence voidance actions, the challenged transaction needs to be (indirectly) disadvantageous to the insolvency estate. This would, for instance, be the case if the challenged transaction has reduced the value of the insolvency estate. Furthermore, the voidance action needs to enhance the probability of the other creditors to gain satisfaction of their claims. In addition to these general requirements, one of the following voidance grounds must be met within a certain time frame (the suspect period).

- Voidance with the intent to discriminate and squandering of assets: if the debtor entered into transactions to put its creditors at a disadvantage, such transactions may be voided within 10 years of the date of the opening of proceedings if the counterparty knew of the debtor's intent, or within two years if the counterparty should have known. If the transactions were concluded with or for the benefit of connected persons (eg, certain group companies), the burden of proof regarding the knowledge of the intention to discriminate is shifted to that connected person; in other words, the connected person must prove that they had no knowledge and were not negligent in having no knowledge.

- If the debtor concluded purchase, barter and supply agreements within the last year before the opening of proceedings, such agreements are further voidable if the counterparty knew or should have known of the debtor's intent to squander its assets.

- Voidance owing to dispositions against no consideration: dispositions against no consideration (except customary occasional gifts and transactions for a reasonable and proportionate amount towards a charitable cause or for the fulfillment of a legal obligation, a moral duty or consideration of decency) and acquisitions of property of the debtor by order of authority, provided that these acquisitions are paid

for with assets of the debtor, are voidable if they were made within two years before the opening of proceedings.

- Voidance owing to preferential treatment: security or payment given to a creditor after the debtor has become illiquid or after the application for the opening of insolvency proceedings or during the last 60 days before such time is voidable if:

    - the creditor obtained a security or payment it was not entitled to or not entitled to in this particular manner or at that particular time (transactions on a delivery against payment basis would, therefore, in principle, not be affected);

    - the security or payment was given to persons who were aware or should have been aware of the intent of the insolvent to give them preferential treatment ahead of the debtor's other creditors; or

    - the transaction was effected for the benefit of a connected person, unless that connected person did not know and should not have known about the debtor's intention to give preferential treatment. If the preferential treatment was, however, given more than one year before the opening of proceedings, such preferential treatment would not be voidable.

- Voidance owing to knowledge of the debtor's insolvency: this is, in essence, applicable on transactions entered into after the debtor has become illiquid, or after the application for the opening of insolvency proceedings, provided that the transaction is considered to be (directly or indirectly) prejudicial to the debtor's creditors and the counterparty had actual knowledge or should have had knowledge of the debtor's insolvency. Transactions carried out more than six months before the opening of insolvency proceedings cannot, however, be voided because of knowledge of the debtor's insolvency.

However, financial assistance, including new and interim financing, which was granted in the context of restructuring proceedings and has also been approved by the competent court during such proceedings may be subject to limited avoidance actions.

If the voidance action is successful, the transaction will be declared as being without any effect regarding the debtor's creditors. As a result, the legal status as it was before the transaction needs to be reinstated, including, among other things, the return of assets transferred under such voided transactions.

However, the voidance provisions and the relevant settled case law are complex and make it, in certain cases, challenging to predict whether a particular transaction may become subject to voidance in a future insolvency. A case-by-case analysis will, however, be necessary, especially regarding a company in financial distress.

## Equitable subordination

**48. Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?**

Under the Austrian law on equitable substitution, loans granted by a shareholder to a company suffering a crisis are classified as substitutions of equity and are, therefore, subject to certain payment restrictions (within as well as outside of insolvency proceedings). A company is deemed to be in crisis if it is either illiquid, over-indebted or in 'need of restructuring' according to the Austrian Business Reorganisation Law. As a consequence, the repayment of such loans (or recourse against the company under such security) is barred until the company is restructured (a repayment block).

According to the Insolvency Code, shareholders' claims arising from loans that are classified as substitutions of equity are subordinated and can only be satisfied after satisfaction of all unsecured and preferential claims and only if

the insolvency court agrees to accept these claims in the course of the insolvency proceedings. Shareholder loans granted outside of a crisis rank pari passu with other senior claims.

Furthermore, if a debtor entered into a transaction with related parties or non-arm's-length creditors before the opening of insolvency proceedings, those transactions may be challenged by the insolvency administrator due to preferential treatment of such 'insiders'. For example, the insolvency administrator may challenge the provision of a security or settlement of an obligation towards the parent or affiliated company, which was not due at such time.

## Lender liability

### 49. Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

Under Austrian law, when dealing with a distressed creditor, there are essentially two bases of liability that a lender should consider before making any credit decision. A lender can, in principle, be liable for damages towards a (viable) debtor if the lender calls in a loan or, in certain cases, refuses to grant further funds, provided that such demand for repayment or credit refusal has, among other things, caused damages to the debtor and was made 'vexatiously'. Whether such action was made vexatiously needs to be assessed on a case-by-case basis and depends on various factors, including, for instance, available collateral or whether there is a special relationship of trust between the parties. Also, 'vexatious conduct' typically requires a certain state of mind (eg, a certain degree of misconduct). Furthermore, a lender can become liable towards a debtor's other creditors in cases where the lender has atypical influence on the debtor (eg, if the lender is represented on the debtor's management board) and the lender's conduct has caused or contributed to a delayed filing for the opening of insolvency proceedings (cf *Eumig* cases).

## GROUPS OF COMPANIES

### Groups of companies

**50. In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?**

In general, the assets of parent (and also affiliated) corporations have to be separated from the assets of subsidiaries (and affiliates) (the principle of separation). Therefore, parents or affiliated corporations can only be held responsible for the liabilities of subsidiaries or affiliates if and to the extent that they have contractually agreed to be liable. However, certain circumstances can arise under which shareholders can be held directly liable. However, this is highly controversial in legal literature and little case law exists. The following situations could give rise to direct responsibility of parent or affiliated corporations:

- mingling of assets: if the assets of the parent or affiliate cannot be clearly separated from the assets of the subsidiary or affiliate (ie, because of lack of accounting);

- qualified material under-capitalization: if the subsidiary or affiliate has been provided with little equity, imposing a higher risk of creditors not being satisfied than in the ordinary course of business; however, intentional dealing would be required from the parent or affiliate to be held liable in this respect;

- factual management of the shareholder: if the shareholder conducts the subsidiary or affiliate's business in a way the managing director would normally do;

- infringement of the subsidiary or affiliate's assets leading to illiquidity: if the shareholder treats the assets of the company in a way that leads to loss of the subsidiary or affiliate's liquid funds; and

- infringement of a legal nature: if the shareholder abuses the legal structure of the subsidiary or affiliate to minimize liabilities.

### Combining parent and subsidiary proceedings

**51. In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?**

Under Austrian insolvency law, insolvency proceedings against a parent and its subsidiary may only be combined for procedural purposes. The proceedings themselves remain independent of one another and the assets and liabilities are not combined into one pool for distribution purposes.

According to article 49 of Regulation (EU) 2015/848 (the Insolvency Proceedings Regulation), any assets remaining in Austria will be transferred to an administrator outside of Austria only if it is possible to meet all claims in Austria by the liquidation of assets in Austrian secondary proceedings.

If insolvency proceedings of members of a group of companies are opened, Austrian insolvency law provides for the application of the rules on cooperation and communication according to articles 56 to 60 and on coordination pursuant to articles 61 to 77 of the Insolvency Proceedings Regulation.

## INTERNATIONAL CASES

### Recognition of foreign judgments

**52. Are foreign judgments or orders recognized, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?**

The Insolvency Code includes rules on cross-border insolvency proceedings.

These provisions apply insofar as no international treaty or Regulation (EU) 2015/848 (the Insolvency Proceedings Regulation) is applicable. Most importantly, assets located outside Austria may become the subject of insolvency proceedings in Austria. Furthermore, Austrian courts will recognize and enforce foreign insolvency proceedings insofar as the standards of the foreign insolvency proceeding are comparable to Austrian insolvency proceedings and provided that the debtor's centre of main interests is located in the foreign jurisdiction. Generally, according to Austrian conflict-of-laws provisions, the laws of the place where the insolvency proceeding is initiated govern the entire proceedings. Special conflict-of-laws provisions apply in certain situations or matters (eg, real property). These principles also apply to reorganisation proceedings.

Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings (replaced by Directive 2009/138/EC) and Directive 2001/24/EC on the reorganisation and winding-up of credit institutions have been implemented in Austria.

Austria is also subject to the Insolvency Proceedings Regulation replacing existing bilateral insolvency treaties.

## UNCITRAL Model Laws

**53. Have any of the UNCITRAL Model Laws on Cross-Border Insolvency been adopted or is adoption under consideration in your country?**

Austria has adopted neither the UNCITRAL Model Law on Cross-Border Insolvency nor the UNCITRAL Model Law on Enterprise Group Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments. However, there are ongoing working sessions of the 'special task force for insolvency law' to consider implementation.

## Foreign creditors

**54. How are foreign creditors dealt with in liquidations and reorganizations?**

Generally, foreign creditors are treated on an equal footing with Austrian creditors during insolvency and restructuring proceedings taking place in Austria, and are free to file the same applications and notifications of claims as Austrian creditors. However, they must appoint a person residing in Austria empowered to accept service on behalf of the foreign debtor.

## Cross-border transfers of assets under administration

**55. May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?**

According to article 49 of the Insolvency Proceedings Regulation, any assets remaining in Austria will be transferred to an administrator outside of Austria only if it is possible to meet all claims in Austria by the liquidation of assets in Austrian secondary proceedings. Other than such transfer of surplus assets, Austrian law does not provide a mechanism to transfer assets subject to insolvency proceedings in Austria to an administration in another country.

## COMI

**56. What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?**

The definition of centre of main interest (COMI) emerges from EU law. There is a general presumption that the COMI of a corporate debtor is at its registered office. Austrian courts focus on objective criteria and therefore the COMI should be ascertainable by third parties. This presumption can be rebutted whenever there are signs indicating that the main administration is in another

country. In the case of a group insolvency, the COMI of each subsidiary must be determined individually.

## Cross-border cooperation

**57. Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognize foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?**

The Insolvency Code allows for cross-border cooperation in several ways. The Austrian insolvency court and the Austrian administrator must provide to the foreign administrator any information deemed to be of importance for conducting the foreign insolvency proceedings without undue delay. Furthermore, the foreign administrator will be granted an opportunity to submit its own proposals relating to the liquidation or the utilization of assets located in Austria or to submit statements in relation to reorganisation plans.

In the case of recognition of foreign insolvency proceedings, the foreign administrator may exercise the powers granted to it by local laws in Austria, except with regard to coercive actions and decisions over legal or other disputes.

The Austrian Supreme Court of Justice has not yet dealt with a case where a lower court has refused to recognize foreign proceedings or to cooperate with foreign courts.

According to the Insolvency Code, the effects of foreign insolvency proceedings are recognized if the debtor's COMI lies within a foreign country and the basic principles of these proceedings are similar to those in Austria, in particular the treatment of Austrian and foreign debtors.

Within the European Union, any insolvency proceedings are recognized in other EU member states as soon as the opening of the proceedings are in effect.

We are not aware of a case where recognition has been refused.

## Cross-border insolvency protocols and joint court hearings

**58. In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?**

We are not aware that Austrian insolvency courts have formally entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries. Austrian insolvency courts have, however, cooperated with other insolvency courts on an informal basis; for example, with German insolvency courts in the insolvency proceedings over NIKI Luftfahrt GmbH.

## Winding-up of foreign companies

**59. What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?**

The proceedings relating to the winding-up of insolvent companies (including judicial arrangements, compositions and analogous actions related to such proceedings) are governed by the Insolvency Proceedings Regulation. If the company's COMI is in Austria, the Regulation stipulates that the main insolvency proceedings are to be opened in Austria. Those proceedings have universal scope and are aimed at encompassing all of the debtor's assets. The Regulation provides for the possibility to open secondary insolvency proceedings to run in parallel with the main insolvency proceedings if the debtor has an establishment in another state; those effects are limited to the

assets located in that state. According to the Regulation, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction. If a court of an EU member state has declared (albeit erroneously) international jurisdiction, the review of that jurisdiction by a court of another EU member state is excluded, as well as the opening of other main proceedings within the scope of the Regulation.

The rules of jurisdiction according to the Regulation establish only international jurisdiction; territorial jurisdiction within that EU member state should be established by the national law of the EU member state concerned.

If the Regulation is not applicable, insolvency proceedings can be opened under Austrian law if the debtor has assets in Austria, based solely on the Insolvency Code.

## UPDATE AND TRENDS

### Trends and reforms

**60. Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?**

*Hot topics*

The Austrian business landscape is currently facing a surge in distressed companies as the post-pandemic economic recovery continues to gain momentum, resulting in the government having withdrawn temporary measures, such as relaxing insolvency laws or state support schemes (eg, loss compensation payments or 'short-time work' allowances) that kept many companies on – much needed – life support. Notably, after having reached at pre-crisis levels in 2022, the number of bankruptcies in Austria rose

significantly in Q1 2023: in the first three months of 2023, the number of bankruptcies was more than one-fourth higher than in the first quarter of 2022 and around 18 per cent higher than in the pre-pandemic period of January to March 2020. By sector, financial services or other services, wholesale and retail trade, construction and accommodation and food service activities showed the highest bankruptcy numbers in Q1 2023.

It is expected that the Austrian business landscape will tighten further, creating the path for a continuing increase of stress scenarios, among other things:

- the unfolding (humanitarian) crisis in Ukraine and related sanctions and measures on Russia, which have not only caused a significant disruption in the energy markets but also considerable supply chain shortages;
- potentially emerging global trade conflicts;
- the recent rise of interest rates; and
- the surging inflation.

Moreover, owing to a mainly pandemic-driven change in market conditions, a considerable number of Austrian companies took on high levels of debt to compensate for revenue lost. These levels of debt, combined with the above-mentioned government support may not only encourage a disproportionate increase of non-performing loans, but also give rise to ‘fallen angels’ (ie, previously solid companies that were reduced to junk bond status due to the pandemic) or ‘zombies’ (ie, companies that are effectively dead but still operate due to cheap borrowings in the past or government support), or both. Against this backdrop, we also expect that novel approaches and strategies will need to be established regarding insolvency-related work-out strategies with respect to debt owed to the Austrian government.

Furthermore, we believe that environmental, social and governance

(ESG)-related topics will play an increasingly important role in restructurings. This is particularly the case regarding 'traditional' lenders and their willingness to grant new money to industries with a negative ESG rating.

Lastly, another hot topic, which is of recent interest across all industries, is the tightened investment control regime on future inbound investments through third-country investors. On 25 July 2020, a new Investment Control Act, which significantly widens the scope of the Austrian foreign investment review rules, came into force. It provides for increased scrutiny and approval requirements, if non-EU (plus non-European Economic Area or non-Swiss) investors make investments in Austria that are related to sensitive economic sectors, including:

- infrastructure, such as energy, information technology, transport, healthcare, telecommunication, foods, defence and data processing;
- technology, such as artificial intelligence, robotics, semiconductors and cybersecurity; and
- resources, such as energy, raw materials, foods and pharmaceuticals.

### *Key cases, decisions and judgments*

In July 2020, insolvency proceedings were opened over the assets of Commerzialbank Mattersburg im Burgenland AG (CMB), a less significant credit institution within the Single Supervisory Mechanism. According to an interim report ordered by the Austrian Financial Market Authority (FMA), CMB was at the time of the initiation of insolvency proceedings over-indebted by at least €528 million. In November 2020, the European Central Bank (ECB) eventually withdrew CMB's banking licence. The insolvency of CMB resulted in a political upheaval in the federal state of Burgenland, including the implementation of an investigation committee.

In March 2022, the FMA, upon the direction of the ECB, decreed the suspension of Sberbank Europe AG's (Sberbank) business with immediate

effect pursuant to the Austrian Banking Act. A government commissioner was appointed to, in essence, supervise the solvent liquidation of Sberbank.

On 13 June 2023, the regional court of St Pölten in northeast Austria opened reorganisation proceedings without self-administration over the assets of furniture retailer Leiner & kika Möbelhandels GmbH (kika Leiner). The group said it has filed for insolvency because of, among other things, management mistakes and difficulties with cost pass-through, as well as declining demand due to the covid-19 pandemic, high energy costs and worsening macroeconomic conditions. According to the public domain, kika Leiner has liabilities of approximately €132 million and about 440 creditors. This includes approximately €40 million in payables to suppliers, which may be covered by insurance and €42 million in taxes and other payments due to the government (including covid-19 state aid the group has received) and payments owed to employees. Accordingly, kika Leiner has offered an insolvency quota of 20 per cent, payable within two years from the approval of the restructuring plan. The approval of the restructuring plan (if any) is expected by the end of September 2023. The group was previously owned by Austrian real estate company SIGNA and South African retailer Steinhoff, which sold the company to SIGNA in 2018.

**** The information in this chapter was accurate as at September 2023.***