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Austria

LENDING & SECURED FINANCE

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This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Austria.

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AUSTRIA
LENDING & SECURED FINANCE

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

The Austrian Banking Act (BWG) contains a list of banking activities that require a banking licence if they are carried out commercially in Austria. The lending business – defined as "*the conclusion of loan agreements and the granting of loans*"– is part of this list. Therefore, lending in Austria is a core task of banks (Austrian banking monopoly) and in general requires a banking licence.

However, the BWG provides for several exceptions to the Austrian banking monopoly in connection with lending. On the one hand, certain market participants (e.g. funding organisations) are generally exempt from the BWG and its licence requirement. On the other hand, lending is only considered a banking activity within the meaning of the BWG if it is carried out on a commercial basis. In this context, "commercial" generally means any sustainable activity to generate income (not necessarily profit).

Furthermore, the Austrian BWG is only applicable if the respective banking activity has an Austrian nexus. This has to be decided on a case-by-case basis, based on criteria such as place of conclusion of the underlying agreement, whether there is a targeted approach to the Austrian market or if the relevant banking services were especially designed for the Austrian market. If there is no Austrian nexus at all, a foreign lender does not need a licence under Austrian law.

There are no general rules under Austrian Law regarding the possibility of foreign lenders (bank or non-bank lenders) to take benefit of security over assets located in Austria. However, certain restrictions may apply, e.g. the acquisition of real property is restricted in some Austrian territories (e.g. *Vorarlberg*), meaning that a permit from the representative authority is required.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

There are no regulatory limitations regarding the interest charged by lenders (under the Austrian Banking Act). However, there are certain regulations under Austrian civil law limiting the amount of interest that can be charged by lenders. For example the Austrian civil law prohibits agreements contrary to public policy (*sittenwidrige Veträge*), in particular "usurious practices" (*Wucher*), meaning interest rates that are clearly disproportionate to market terms and conditions and which were only agreed upon due to the weakness, predicament or inexperience of the borrower.

Further, Austrian law distinguishes between consumers and entrepreneurs, providing in general stricter information duties and formal requirements when dealing with consumers. This also applies to interest rates.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

There are no restrictions or regulations under Austrian law with respect to the disbursement of foreign currency loan proceeds that deviate from the rules that would apply to an Austrian creditor. However, the Austrian Financial Market Authority released Minimum Standards with respect to foreign currency loans in general and expects credit institutions to comply with these Minimum Standards.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii.

inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

In general the granting of security requires a (i) title (a pledge agreement) and (ii) a certain mode (*Modus*) depending on the type of pledge for the security to become valid.

4.1. Real property (land), plant and machinery

Real property (land) and plant can serve as security under Austrian law. This form of security is called mortgage (*Hypothek*). As outlined above for the establishment of a mortgage a (i) pledge agreement (which needs to be notarised) as title and (ii) a corresponding mode is required. Based on the notarised pledge agreement, the mortgage needs to be registered in the Austrian land register (*Grundbuch*) as mode, thus the mortgage becomes valid.

The same general principles apply to the pledge of machinery. However, in case of machinery the pledge agreement does not need to be notarised and the relevant mode is the physical delivery (*Faustpfandprinzip*). According to the *Faustpfandprinzip*, the pledger must transfer the equipment to the pledgee by physical delivery (transfer of possession) if possible. This principle is applicable for every kind of pledge of a tangible and moveable object in Austria. If a physical delivery of the machinery is not possible, the pledge can be perfected by symbolic delivery, i.e. attaching signs on the equipment, in such way that the public will recognize the pledge. Further, the pledger is limited regarding the disposal of the pledged object.

Under Austrian law it is possible to have multiple pledges (mortgages) over one property. The ranking of the mortgages depends on the time when the land register court receives the respective application for registration.

4.2. Equipment

Equipment is considered as tangible moveable property, therefore, the above-mentioned rules regarding machinery apply.

4.3. Inventory

In general, the above-mentioned principles regarding pledge of equipment also apply to the pledge of inventory.

However, in case of the pledge of inventory as a whole (*Gesamtsache*) the mode of physical delivery is unfeasible. Therefore, the mode is usually limited to a symbolic delivery by handing the keys to the rooms (e.g. warehouses), where the pledged inventory is stored. As court rulings in Austria are strict in this regard, it is recommended to establish a list of all the goods in stock and to mark the warehouse in such a way that everyone can clearly recognize that the goods have been pledged.

4.4. Receivables

Receivables can serve as security under Austrian law; they can either be (i) pledged or (ii) assigned:

The creation and perfection of a pledge over receivables requires a pledge agreement as title and as corresponding mode either (i) the notification of the obligor (*Drittschuldnerverständigung*) or (ii) a record in the creditor's/assignor's books and records (*Buchvermerk*).

The assignment of receivables as security (*Sicherungsabtretung*) requires a title (assignment agreement which does not need to be notarised) and as mode, the same publicity requirements as the pledge over receivables (i.e. notification of the obligor or a record in the creditor's/pledgor's books and records) are applicable.

4.5. Shares in companies incorporated in your jurisdiction

In principle, shares in companies can serve as security under Austrian law, either by way of a pledge of shares or by a full transfer of rights for security purposes (*full transfer of rights, Sicherungsübereignung*). The major difference between a pledge and a full transfer of rights is that a pledge does not change the ownership of the secured asset, whereas a full transfer of security provides the creditor with full ownership (with the obligation to retransfer the assets as soon as the debt is fully repaid). In practice, the pledge over shares is more common as the full transfer of rights offers no substantial benefit over the pledge of shares but usually requires the fulfilment of stricter formal requirements (in particular with respect to the mode).

Before considering the pledge or full transfer of shares, it is highly recommended to check the articles of association of the respective company as the articles of associations can require that the shareholders have to approve the pledge. In case the articles of association require the consent of the shareholders, a pledge would be void, if the prior consent is missing.

Regarding the formal requirements for the pledge of shares or full transfer of rights, the general principles

apply, i.e. a title (pledge agreement) and a corresponding mode (depending on the type of company – Partnerships, Limited Liability Companies, Flexible Companies, Joint Stock Companies) is required (see below).

4.5.1. Partnerships (*Kommanditgesellschaft* – limited partnership; *Offene Gesellschaft* – unlimited partnership)

The pledging of shares as a whole as well as the pledging of certain monetary claims connected with the share i.e. profit claim, credit balances and liquidation proceed are possible. However, the pledging of shares with respect to limited and unlimited partnerships is only possible, if the articles of partnership (*Gesellschaftsvertrag*) explicitly provide for this possibility or if all shareholders agreed to the pledge. In addition to the pledge agreement (which does not need to be notarised), the company (its partners) must be notified of the pledge (as corresponding mode) in order for the pledge to become valid.

A full transfer of rights of shares is possible, if this is stipulated in the articles of partnership (*Gesellschaftsvertrag*) or if the consent of all shareholders is provided. In addition, the full transfer of rights of shares has to be incorporated in the company register in order to be perfected.

4.5.2. Limited Liability Company / Flexible Company

As mentioned above, the pledging of shares requires a title (simple written form is sufficient) and the notification of the company (the managing director of the company needs to be informed).

The full transfer of shares for security purposes on the other hand requires a notarial deed as title and the incorporation of the transfer into the respective companies register as corresponding mode.

The same rules apply to the newly created company form of the "*flexible company*".

4.5.3. Joint Stock Company

Regarding the relevant title for the pledge of shares the same requirements as for limited liability companies apply, i.e. the establishment of a pledge agreement (simple written form is sufficient). The pledged property regularly includes the shares held by the pledgee together with the related property rights as well as any credit balances on the securities accounts (*Wertpapierdepots*) where the shares are deposited, insofar as these credit balances result from the shares.

The respective mode for the pledge of shares depend on the type of shares. Under Austrian law shares in joint stock companies are certificated as securities (*verbriefte Wertpapiere*), either as bearer shares (*Inhaberaktien*) or as registered shares (*Namensaktien*): (i) Bearer shares are usually deposited in securities accounts (*Wertpapierdepots*) managed by depository banks (*Depotbanken*). A possible mode for the perfection of the pledge would be to instruct the depository bank to store the pledged shares for the pledgee (*Besitzanweisung*) and eventually to provide a record in the pledgor's books and records (*Buchvermerk*). (ii) The pledge over registered shares is perfected by way of endorsement (*Indossament*) and the transfer of the respective registered share. However, despite the transfer of the registered share, the pledgee is not entitled to exercise the shareholder's rights, only the shareholder who is entered into the share register is entitle to exercise his rights.

4.6. Applicable law

In principal, it is possible to choose foreign law as the governing law of an agreement (*choice of law, freie Rechtswahl*) under Austrian law. Hence, the title for the establishment of a security (assignment agreement) can be created under a foreign law governed document.

However, due to the stringent formal requirements for the granting and perfection of certain security rights, it is often not possible to create a security under a foreign law governed document, e.g. the mortgage agreement for the incorporation of a mortgage into the land register has to be governed by Austrian law. In addition, the mode for the perfection of securities has to be governed by Austrian law. Therefore, it is highly recommended to establish Austrian law governed documents regarding all security rights over assets, which are located in Austria.

Please also see question 20. With respect to the exemption regarding consumers.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

In general, the granting of security over future assets of a company is not possible under Austrian law. Due to the principles of granting securities under Austrian law (i.e. principle of specialty and accessoriness), security arrangements must be made specifically with respect to each asset including provisions for the requisite perfection. However, it is possible to assign future receivables, if the future receivables are properly described in the assignment agreement.

The same principles (i.e. principle of specialty and accessoriness) apply to the question whether or not a company can grant security for future obligations. Therefore, the collateralisation of a future obligation must be determinable (i.e. properly described in the respective agreement), meaning it needs to contain information on creditor and debtor as well as the underlying legal basis of the obligation.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

A single security agreement cannot be used to take security over all of a company´s assets, because under Austrian law a pledge can only be established on individually determined objects (principle of specialty) – see also answer to question 5. Due to the various perfection requirements for the different types of securities, it is common market practice in Austria to have separate security agreements for each type of asset.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

In Austria the principle of freedom of form applies. Therefore, it is in general up to the parties in which form they chose to enter into an agreement and execute a transaction. However, for some transactions, Austrian law provides for certain formal requirements: (i) **simple written form** (*einfache Schriftform*), in this case the validity of the legal transaction requires the written drafting of the essential points of the agreement and the signature of the party(s) (e.g. *surety*, *Bürgschaft*); or (ii) **public form** (*öffentliche Form*), where a notary public or the court have to participate in the transaction (by way of establishing a notarial deed or legalisation by a notary public or authentication of the signatures by the court.

7.1. Notarial Deed

A notarial deed needs to be established by a notary public, with the notary public proving the identity of the parties, their personal ability and entitlement to enter into the agreement. Further, the notary public must record their statements in writing with full clarity and determination and, after reading the statements out loud, the notary public must personally question the parties to ensure that they are willing to enter into the agreement, before the signing of the agreement.

It is also possible to set up foreign-language notarial deeds if the notary public or his substitute is a court-sworn or court-certified interpreter or has passed the diploma examination for translators. If one of the parties is not familiar with the language in which the notarial deed was drawn up, a court-certified or certified interpreter must be consulted.

7.2. Legalisation

In case of a legalisation (certification of a signature), the notary public or the court certifies that a signature (company signature) on a paper document or an electronic signature (company signature) on an electronically created document is genuine, i.e. the signature was executed personally by a specific person.

8. Are there any security registration requirements in your jurisdiction?

Under Austrian law, only the pledging of real property (including plants) and intellectual property requires a registration. The registration requirements depend on the type of securities:

8.1. Real property

Real property (land) and plants need to be registered in the Austrian land register (*Grundbuch*). As mentioned under point 4.1. real property (land) and plants can serve as security, whereby this form of security is called mortgage (*Hypothek*). Besides the requirement of a valid title, the mortgage needs to be registered with the encumbrance sheet (*Lastenblatt*) of the relevant land register body to become effective. The registration is only permitted, if the respective mortgage agreement states either (i) a fixed amount of money as consideration (*Festbetragshypothek*) or (ii) a maximum amount of money (*Höchstbetragshypothek*).

8.2. Intellectual Property Rights

If a patent or a trademark is pledged, it has to be registered in the respective register, i.e. patent register (*Patentregister*) or trademark register (*Markenregister*) to become effective.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement?

If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Loan agreements or guarantees do not trigger any taxes or stamp duties (*Rechtsgeschäftsgebühr*) under Austrian law. Pursuant to the Austrian Stamp Duty Act (*Gebührengesetz*) certain kind of agreements, in particular assignment agreements (*Zessionen*) and surety agreements (*Bürgschaften*) are subject to stamp duty. For assignment agreements, a stump duty in the amount of 0.8% of the consideration will apply and for surety agreements a stamp duty of 1% of the secured interest will apply.

However, the Austrian Stamp Duty Act also provides for certain exemptions, the most important exemption refers to transactions concluded to secure loan or guarantee obligations, which under certain conditions do not trigger any stamp duty. Therefore, assignment agreements and surety agreements do not trigger stamp duty, if they secure loan or guarantee obligations.

Further, there are certain practices to avoid Austrian stamp duty: for instance no written agreement is signed by the parties; an offer of one party will be accepted by the other party by oral acceptance or by factual behaviour (paying the purchase price for example). Another possibility would be that the parties do not sign the security agreement in Austria and the document never reaches Austrian soil (by no means).

In case of a required notarisation (e.g. for the establishment of a mortgage agreement), notary fees may be payable, depending on the transaction value. Further, for the registration of a mortgage with the respective land register, a registration fee in the amount of 1.2% of the secured amount applies. For the registration of pledges over trademarks and patents, a fee in the amount of EUR 128.00 (as of July 1 2022) per registration applies.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

In general, a company can guarantee or secure the obligations of another group company. However, due to the strict Austrian capital maintenance rules, a company guarantee or security of another group company may violate Austrian capital maintenance rules (*Kapitalerhaltungsvorschriften*). The Austrian capital maintenance rules apply to limited liability companies, flexible companies and joint stock companies as well as to certain kind of partnerships, where the only unlimited partner is a limited liability company or joint stock company.

The main purpose of the capital maintenance rules is to guarantee the preservation of the company's liability fund for the protection of the company's creditors. Capital maintenance rules are violated if the company´s assets are distributed to a shareholder or third party in contrary to the mandatory statutory provisions. Distributions to shareholders can be made (i) by dividend distributions regarding the profits of the company based on a shareholder's resolution (ii) by way of capital decrease of the company based on a shareholder's resolution or (iii) in the course of the liquidation of the company.

In any other case, the company must ensure that the transaction is in line with the "arms-length principle" when entering into a transaction with its shareholders or group companies on the same or on an upper group level, otherwise such transaction could violate the Austrian capital maintenance rules. The evaluation, whether or not a transaction is at "arms-length" is inter alia based on the question, if there is an objective imbalance between service and consideration (*Leistung und Gegenleistung*). Such an imbalance indicates that a transaction could not be in line with the "arms-length principle" and might cause a violation of Austrian capital maintenance rules. However, a transaction that is operationally justified (*betrieblich gerechtfertigt*), meaning the transaction is clearly in the benefit of the company and that would have been concluded with a third party under the same conditions, even though there is an objective imbalance between service and consideration, does not violate Austrian capital maintenance rules. According to recent case law of the Austrian Supreme Court, such an operational justification is required in any case, even if there is no imbalance between service and consideration. This requirement for operational justification even when there is no imbalance is criticised by Austrian scholars and it remains to be seen how Austrian case law will develop further.

If a transaction violates Austrian capital maintenance rules, this transaction could be null and void and the company may claim for repayment/restitution. Further, the management might become personally liable to the company for any damage resulting thereof.

Due to these strict capital maintenance rules guarantees or any other securities provided as upstream or side-stream guarantees may violate these rules. Therefore, an upstream or side-stream guarantee must particularly comply with the "arms-length principle" and be operationally justified. A downstream guarantee or any

other security to a subsidiary company is not restricted under Austrian law.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

As discussed in question 10 above, Austrian companies must comply with strict capital maintenance rules. Therefore, any upstream or side-stream guarantee or security may violate these capital maintenance rules, in particular if the "arms-length principle" is violated and the granting of security is not operationally justified. Consequently, the acquisition of shares in a company must not be collateralised by guarantees or other securities of the target company itself. This also applies to shares of any company, which directly or indirectly owns shares in the company, as well as to shares in a related company.

However, there are no such restrictions with respect to downstream guarantees or any other securities granted to a subsidiary company.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

In general, a syndicated loan structure is entered into between the borrower and several lenders (mainly banks) including a separate consortial agreement arranging the internal and external relations of the syndicate. The lenders appoint a trustee or agent (*Konsortialführer*), who administers the syndicate and pool their securities in one pool in order to manage and realize the securities in a more efficient way.

The structure of such a security pool concept depends on the type of security, whether it is an (i) accessory or (ii) non-accessory security:

(i) accessory securities (*akzessorische Sicherheiten*), e.g. pledge or surety cannot exist without the underlying secured claim. Therefore, it is not possible to arrange a security structure regarding accessory securities with only one agent, which is not at the same time a lender in respect of all obligations being secured by the accessory securities. A possible solution is to establish a "parallel debt" structure, where all lenders agree that the security agent is the joint and several creditor of all claims and the borrower enters into a separate obligation (in the amount of the total loan amounts of all lenders) towards the security agent (the parallel debt). This parallel debt will be collateralised (the security is accessory towards the parallel debt) and the security agent acts as trustee for the other lenders.

The concept of parallel debt structure is not yet officially recognised by Austrian courts decision in this regard. However, it is common market practice in Austria to establish a parallel debt structure and appoint an agent.

(ii) non-accessory securities (*nicht akzessorische Sicherheiten*) may exist even, if the borrower has repaid the outstanding and secured claim (for instance a guarantee). Therefore, it is possible under Austrian law that one trustee or agent holds collateral on the syndicate´s behalf and enforces the snydicate´s rights under the loan documentation.

In case of an appointment of a security agent, the lenders usually agree that only the security agent shall have the right to enforce the securities and will then distribute the proceeds from such enforcement among all lenders.

Another concept in the course of the restructuring of a company has become increasingly popular in Austria recently, i.e. the restructuring trust (*Sanierungstreuhand*). In case of a restructuring trust, the shares of the company are transferred to a trustee respectively will be transferred to a trustee in case certain predefined circumstances occur. The trustee then shall manage the company and if it is not possible to end the "crisis" of the company to initiate a selling process. There are different reasons for the establishment of a restructuring trust and installing a trustee as shareholder and managing director of the company, e.g. the financing banks have lost faith in the previous management or the existing shareholders (*Altgesellschafter*) did not participate in the restructuring of the company.

The main benefit of this concept is that it enables creditors through the trustee to restructure the company and, if the restructuring fails, the trustee can perform a well-structured sales process generating high revenues for the financing banks and existing shareholders. This would not be possible, if the shares are merely pledged. As there is no uniform model for the restructuring trust, it can be structured differently for each individual case.

Even though the restructuring trust is already used as restructuring method in Austria, the Austrian Supreme Court has not yet approved this concept so far.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

As described above under question 12, Austria recognizes the role of an agent and trustee. For further information, please see above, question 12.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

In general, under Austrian law it is possible to choose foreign law (including English law) as the governing law of an agreement (*choice of law, freie Rechtswahl*).

However, there is an exception regarding the choice of law in relation to consumers. According to Article 6 of the Regulation (EC) 593/2008 of June 2008 on the Law applicable to Contractual Obligations (*Rom I Verordnung*), an agreement entered into between a consumer and an entrepreneur shall be governed by the law of the country in which the consumer has his habitual residence, provided that the entrepreneur (i) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (ii) by any means, directs such activities to the home country of the consumer. Further, the choice-of-law clause must not violate European law and the Austrian ordre public (i.e. general principles of law) or mandatory provisions protecting e.g. workers or consumers.

Please also see point 4.6. with respect to the applicable law of security agreements.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Recognition and enforcement of foreign judgments are regulated in the Austrian Enforcement Code (*Exekutionsordnung*) as well as in bilateral and multilateral treaties:

- In general, Austrian courts have to recognise judgments from other member states of the European Union without any additional procedures, if the judgments do not violate the Austrian ordre public (i.e. general principles of law).
- Judgments of non-European Union member states may be enforced by Austrian courts, if there is a bilateral or multilateral treaty. With respect to the United States a multilateral treaty is in force, i.e. the Hague Convention on Choice of Court Agreements. This convention is applicable only between entrepreneurs and refers to agreements where the court of jurisdiction is explicitly agreed upon (either Austria or the United States). In this case the decision of the court explicitly agreed upon is enforceable either in Austria or the United States.
- Since the “Brexit” became effective and the United Kingdom is no longer a member state of the European Union the recognition and enforcement of judgments can no longer be based on European rules. However, there is a bilateral treaty between Austria and the United Kingdom (as well as Northern Ireland) in place, regulating the mutual recognition and enforcement of judgments.

Further, Austria is a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention). Therefore, foreign arbitral awards (e.g. English and US courts) may be generally enforced in Austria.

16. What (briefly) is the insolvency process in your jurisdiction?

Prerequisite for the opening of insolvency proceedings is an application by a creditor or debtor. According to the Austrian Insolvency Act (*Insolvenzordnung*) a debtor is obliged to apply for the opening of insolvency proceedings, if the debtor (the company) is insolvent or overindebted (and the company cannot provide a positive going-concern prognosis). The debtor must apply for the opening of insolvency proceedings immediately, but no later than 60 days after the

occurrence of the aforementioned insolvency grounds (otherwise he may be liable for damages and criminal prosecution).

The insolvency proceedings can either be executed as (i) reorganisation proceedings (*Sanierungsverfahren*) or (ii) bankruptcy proceedings (*Konkursverfahren*). The primary objective of Austrian insolvency proceedings is the reorganisation of the company and, if reorganisation is not possible, the equal settlement of the creditors' claims.

(i) Reorganisation proceedings (*Sanierungsverfahren*)

Reorganisation proceedings are initiated upon request of the debtor and can be administered by the debtor itself (*Sanierungsverfahren mit Eigenverwaltung*) or administered by a court appointed insolvency administrator (*Insolvenzverwalter im Sanierungsverfahren ohne Eigenverwaltung*).

As requirement for the reorganisation proceedings the debtor has to provide to the court a restructuring plan (before the opening of the reorganisation proceedings) with a minimum debt repayment quota of at least 20 per cent or, if the debtor wants to administer the reorganisation himself (*Eigenverwaltung*), a quota of at least 30 per cent payable within two years upon the approval of the restructuring plan. If this requirement cannot be achieved bankruptcy proceedings will start.

The reorganisation proceedings take effect at the beginning of the day following the public announcement of the contents of the reorganisation proceedings (in the Austrian "*Ediktsdatei*"). After the public announcement, the insolvency court convenes the first creditor's meeting. Within a specified period, the creditors of the reorganisations proceedings are requested to file their claims. The time for filing claims ends 14 days before the general creditor´s meeting (*allgemeine Prüfungstagsatzung*). The general creditor´s meeting itself takes place 60 to 90 days after the opening of the reorganisations proceedings and serves to examine whether and to what extent filed claims are to be taken into account in the reorganisations proceedings. The creditor's meeting has to approve the restructuring plan. If the creditors do not approve the restructuring plan the reorganisation proceedings will be transformed to bankruptcy proceedings (please see below).

The restructuring proceedings formally end with the approval of the restructuring plan. The debtor then has to fulfil the restructuring plan and provide the payments to the creditors according to the restructuring plan otherwise the insolvency proceedings will be reopened.

(ii) Bankruptcy proceedings (*Konkursverfahren*)

The bankruptcy proceedings are initiated by either the debtor or a creditor. The insolvency court always appoints a liquidator (*Masseverwalter*) when the proceedings are opened. The liquidator has to administer the bankruptcy proceedings and liquidate the assets involved in the bankruptcy proceedings.

With the exception of the initiation of the proceedings, the course of the bankruptcy proceedings corresponds to that of the reorganisation proceedings (see above). If the liquidator has obtained sufficient proceeds from the liquidation of the assets involved in the bankruptcy proceedings, he may distribute such proceeds between the creditors of the bankruptcy proceedings. As soon as all the assets are distributed among the creditors, the bankruptcy proceedings have ended.

However, the debtor may present a restructuring plan in the course of the bankruptcy proceedings and request for its acceptance in order to avoid the liquidation of the assets. If the creditors approve the restructuring plan, the debtor may continue its company and has to provide the payments to the creditors according to the restructuring plan.

Apart from insolvency proceedings under the Austrian Insolvency Act, Austrian law now provides also for the possibility of a restructuring under the Austrian Restructuring Act (*Restrukturierungsordnung*). The Austrian Restructuring Act was passed in July 2021 to implement the Restructuring Directive (EU) 2019/1023 into Austrian law. The aim of the Austrian Restructuring Act is to avoid (if possible) proceedings under the Austrian Insolvency Act by providing the possibility of a financial restructuring in case of a probable bankruptcy (*wahrscheinliche Insolvenz*). A probable bankruptcy is presumed if the equity ratio falls below 8% and the notional debt repayment period exceeds 15 years. In this case the debtor may apply for a financial restructuring before the insolvency court. The application must include a restructuring plan or concept and the debtor must not be insolvent already. However, no applications for restructuring under the Austrian Restructuring Act have been filed so far.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

All creditors have to be treated equally and receive a quote of their claim in the insolvency process under the Austrian Insolvency Act (*Insolvenzordnung*). However, secured creditors have priority in the settlement of their claims regarding the assets in which they hold a security

right. Such secured creditors are entitled to enforce their right of separation (*Absonderung*) – e.g. the right of a pledgee to be satisfied preferentially from the realization of the pledge – in the course of the insolvency proceedings.

According to the Austrian Insolvency Act, this right of separation is not affected by the opening of insolvency proceedings. However, secured creditors are barred from exercising their rights for a maximum period of 6 months after the opening of insolvency proceedings, if the exercise of such rights would endanger the continuation of the debtor´s business. Further, separation rights, acquired within 60 days before the opening of insolvency proceedings by way of execution, expire upon the opening of insolvency proceedings.

In the course of the insolvency proceeding the assets of the insolvency estate (*Insolvenzmasse*) will be sold and any proceeds which remain **after settlement of the secured creditor´s claims** will be distributed among the creditors. The liquidator is responsible for the liquidation of the insolvency estate.

18. Please comment on transactions voidable upon insolvency.

The provisions regarding possible voidable transactions upon insolvency are set out in sec. 27 ff of the Austrian Insolvency Act (*Insolvenzordnung*). In general, transactions are voidable, if there is a probability that the chances of satisfaction of the creditors will be improved by the avoidance. Under the Insolvency Act transactions are voidable upon insolvency if:

- they are performed prior to the opening of the insolvency proceedings;
- they affect the debtor's assets;
- they discriminate creditors; and
- an event of avoidance as listed in the Austrian Insolvency Act occurs (see below).

The events of avoidance pursuant to the Austrian Insolvency Act are:

- avoidance on grounds of intention to discriminate (*Anfechtung wegen Benachteiligungsabsicht*)
- avoidance due to waste of assets (*Anfechtung wegen Vermögensverschleuderung*)
- avoidance due to free transactions (*Anfechtung wegen unentgeltlicher Verfügungen*)
- avoidance due to preferential treatment (*Anfechtung wegen Begünstigung*)
- avoidance due to knowledge of insolvency (*Anfechtung wegen Kenntnis der Zahlungsunfähigkeit*).

19. Is set off recognised on insolvency?

In general, a set-off is possible in the course of insolvency proceedings. The general offsetting requirements of the Austrian General Civil Code – modified by specific provisions of the insolvency act – apply.

According to the Austrian Insolvency Act a set off is not admissible in case a creditor has become debtor after the opening of insolvency proceedings or acquired the claim against the debtor after the opening of the proceedings. Further, a set-off is not admissible in case a third party acquired his claim in the last 6 months prior to the opening of the insolvency proceedings and if the third party knew or should have known that the debtor is insolvent.

On the other hand, a set-off is admissible even if the claim of the debtor or creditor is either conditional or payable at a future date.

With respect to Austrian banks, the General Terms and Conditions of Austrian banks contain a separate provision for entrepreneurs regarding set-off. Due to the terms and conditions entrepreneurs explicitly waive their right to set-off their liabilities towards banks with corresponding receivables in the course of insolvency proceedings. Therefore, if the entrepreneurs do not exclude this provision, they are not entitled to set-off their liabilities towards banks in the course of insolvency proceedings. However, this provision does not apply to consumers.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

In the event of an insolvency, a retention of title agreement may take priority over a secured lender's security, if the secured lender has not acquired the pledge in good faith. In case the pledge is not acquired in good faith, the retention of title shall remain unaffected and the third party may demand the return of the pledged object from the pledgee. The retention of title shall only take priority over the secured lender's security, if the respective asset is considered movable. In any other case, a retention of title cannot influence a secured lender's security in an insolvency proceeding.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

There are no impending reforms. Please refer to question 21 regarding the recent implementation of the Restructuring Directive (EU) 2019/1023 into Austrian law by way of the Austrian Restructuring Act.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

According to a recent survey, the biggest part of the lending provided to companies in Austria is still the traditional bank debt, whereas only a minor proportion of the lending consists of alternative financing options. The most important alternative financing options in Austria are silent partnerships, business angels and mezzanine finance. The rest of the total lending provided to companies in Austria consists of subsidies, cash flow and equity capital.

The COVID 19 crisis had a major impact on the financing requirements in particular of SMEs. Due to the crisis the need for credit substantially increased. For financing issues, the company's bank (*Hausbank*) continued to be the main point of contact with the consequence that the proportion on bank finance increased, while the demand for alternative financing options is declining.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

Since the "Brexit" became effective and the United Kingdom is no longer a member state of the European Union, banking activities with respect to the United Kingdom can no longer be based on the "European Passport". Consequently, according to current national law a separate banking license is required before providing any banking activities with respect to the United Kingdom.

As the LIBOR benchmark is no longer published since 1.1.2022, LIBOR can no longer be used as benchmark in Austrian financing documents. Financing products that are based on the LIBOR will have to be adapted by replacing the LIBOR with an equivalent benchmark. In general, when referring to a benchmark, it is advisable to include a reference to an alternative economically comparable benchmark in case the original benchmark is no longer published.

In the course of the COVID 19 crisis, the need for credit increased significantly, and at the same time banks rejected loan applications for lack of sufficient collateral. For this reason, the Republic of Austria gave companies the option of obtaining bridging guarantees through the Austrian Development Bank (aws). These guarantees help companies to obtain loans from banks even if the companies cannot provide the banks with sufficient collateral. Therefore, Austrian companies could apply for a guarantee from aws (if they do not have sufficient collateral) before applying for a loan. As of June 15, 2022, the application deadline for aws bridging guarantees ended. Guarantees that have already been approved remain in place until the agreed end of the term (maximum of 5 years).

In the light of the tightened sanctions against Russia, it should be noted that the sanctions of the European Union under sec. 215 TFEU may have an impact on existing financings, the realisation of collateral or the transfer of assets of sanctioned persons and companies. Because of the sanctions frozen assets may no longer be disposed of and consequently may suffer a loss of value. This may cause the risk of an under-collateralisation of existing financings or may lead to the risk that collateral under existing financings may not be realised.

The Financial Market Authority (FMA) recently issued a regulation (KIM-VO) to establish sustainable lending standards for residential real estate financing, which became legally binding for credit institutions as of August 1, 2022. In particular, the regulation provides for upper limits with regard to the loan-to-value ratio (max 90%), the debt service ratio (max 40%) and the term (max 35 years) for residential real estate financings concluded with consumers between August 1, 2022 and December 31, 2025. These caps must therefore be considered when drafting (mortgage-backed) loan agreements with borrowers for private residential real estate financing.

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