ALLEN & OVERY

September 2017

Restructuring Across Borders

Austria: corporate restructuring and insolvency procedures

Contents

Introduction

Amendments were made to Austrian insolvency laws which came into force on 1 July 2010. As a result, settlement proceedings were abolished and replaced with two new forms of restructuring proceedings.

Following these reforms, the five principal restructuring and insolvency regimes for companies under Austrian Law are:

- bankruptcy proceedings (*Konkursverfahren*) – including a restructuring scheme within bankruptcy (*Sanierungsplan*)
- restructuring proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*)
- restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*)
- business reorganisation
- informal settlement (*außergerichtlicher Ausgleich, stiller Ausgleich*)

Bankruptcy proceedings (*Konkursverfahren*)

The purpose of bankruptcy proceedings (*Konkursverfahren*) is to determine the value of the debtor's estate (*Konkursmasse*) and distribute any assets among creditors in circumstances in which the debtor is insolvent or over-indebted. Either the debtor itself or its creditors have the right to file a petition for bankruptcy. However, once it is apparent that the criteria for commencing bankruptcy proceedings are fulfilled, the debtor is obliged to apply for its own bankruptcy without culpable delay ("culpable delay" does not include the diligent pursuit of the commencement of restructuring proceedings where the debtor retains the right to self-administration) and in any case no later than within 60 days (in exceptional cases caused by natural disasters, this period may be extended by another 60 days). Failure to file for bankruptcy or belated filing can result in the personal liability of the debtor or, in the case of a corporate entity, the debtor's management, for any damages caused by the debtor's continued trading, together with potential criminal responsibility.

Prior to the commencement of bankruptcy proceedings, the court conducts a preliminary examination as to whether the application should be dismissed on certain formal grounds (such as failure to meet the requirement that the debtor's estate be sufficient to cover the costs of the bankruptcy proceedings). Usually, a deposit of approximately EUR 4,000 is required and in the case of a legal entity, the managing directors (including persons who held the position of managing directors of the insolvent legal entity in the three-month period preceding the application for bankruptcy proceedings) or shareholders with a participation exceeding 50 per cent in the company are jointly and severally liable for the deposit in an amount of up to EUR 4,000. If a deposit is paid by such persons they may, in respect of the deposit, file a priority claim (*Masseforderung*) in the bankruptcy proceedings.

Simultaneously with the decision to open bankruptcy proceedings, the court appoints a bankruptcy receiver

(*Masseverwalter*) for the purpose of administering, determining and liquidating the debtor's estate under the supervision of the court.

The court may additionally choose (either by its own initiative or by petition of the creditors' assembly) to appoint a creditors' committee (*Gläubigerausschuß*) to assist the receiver. This will be the case if the debtor's business is particularly large or if the nature of the debtor's business so requires, (ie in insolvency proceedings involving large corporate debtors). If the debtor's enterprise is to be sold or leased, the court is obliged to appoint a creditors' committee. The creditors' committee may consist of three to seven members who are usually nominated by the creditors and who may be creditors or third parties. However, in most insolvency proceedings, no creditors' committee is appointed, in which case its functions are carried out by the court.

In its decision on commencing bankruptcy proceedings, the court will also set a deadline for filing all claims against the debtor prior to the date of a creditors' hearing. This date will usually be 14 days prior to the court hearing for the examination of claims (such court hearing must take place between 60 and 90 days after the commencement of the proceedings). If creditors fail to meet this deadline, a further creditors' hearing may be scheduled. However, each creditor who fails to meet the initial deadline must pay the receiver EUR 50 plus VAT (certain exceptions exist if the creditor can provide evidence that it was impossible to meet the deadline). If a creditor fails to file a claim at all, it will be unable to participate in the distribution of proceeds from the sale of the debtor's estate.

The receiver's task is to establish whether it will be possible for the debtor's business to continue and, where there is no prospect of continuation, to sell all the debtor's assets and distribute the proceeds to the creditors. Generally, Austrian insolvency law favours the concept of reorganisation over distribution of the debtor's assets, which is only done when the continuation of the debtor's business would increase the loss to creditors.

Once all of the proceeds from the liquidation of the debtor's estate have been distributed, the bankruptcy proceedings will be terminated by a court order. The termination of the proceedings does not have the effect of discharging the claims of creditors which have not been satisfied in full. Creditors whose claims have been determined by the receiver (or whose claims have been disputed by the receiver and were subsequently confirmed by way of a court judgment) may enforce their rights against the debtor with respect to the unsettled portion of their claim for a period of 30 years (if the debtor comes into possession of any assets within such period). In the case of a corporate debtor, however, bankruptcy will eventually result in the ultimate dissolution of the company, thus preventing later recourse against the debtor for payment of outstanding amounts.

Restructuring scheme (*Sanierungsplan*)

The bankrupt debtor may apply to have the bankruptcy proceedings converted into a restructuring scheme (*Sanierungsplan*). The procedure governing a restructuring scheme forms part of the bankruptcy proceedings because an application for a restructuring scheme is filed once bankruptcy proceedings have been initiated. Accordingly, a restructuring scheme should be recognised across the EU as part of the bankruptcy proceedings. Other types of restructuring proceedings are also available if applied for in the first insolvency application to the court (see below for further details).

In an application for a restructuring scheme, the debtor must submit a proposal for the satisfaction of at least 20 per cent of all its debts within a period of two years and must also demonstrate that it is capable of fulfilling

this proposal. After a preliminary examination by the court regarding whether to dismiss the application on certain formal grounds, the creditors decide (at a creditors' hearing) whether to accept this offer by both a simple majority of the creditors attending the hearing as well as a simple majority based on the value of their claims. If only one of these majorities is reached, the debtor may demand that another creditors' hearing be held. At this new creditors' hearing, the creditors are not bound by the votes that they cast in the previous creditors' hearing (i.e. they may decide to cast their votes differently at the new hearing).

The quota of 20 per cent is a statutory minimum requirement for a restructuring scheme and needs to be proportionate to the debtor's actual economic and financial standing. Hence, depending on the circumstances, it may be necessary to offer a proposal with a higher quota and/or shorter payment period in order for the creditors to accept the proposal. In practice, creditors rarely accept that the amount to be paid may be disbursed within the maximum term of two (or five) years. Usually creditors demand to be provided with a payment plan, according to which the debtor is obliged to pay the amounts in instalments, starting immediately after the acceptance of the proposal and continuing periodically over a period of two (or five) years.

Following the creditors' acceptance of the restructuring scheme, the court must examine the proposed scheme for any grounds on which it should refuse confirmation of the restructuring. These grounds include, among others, consideration of whether the commencement of the restructuring proceedings was unlawful or whether severe procedural mistakes have occurred, etc. If no such grounds exist, the court will issue an order setting out the terms of the agreement reached and the portion of debts to be repaid by the debtor. Once the debtor has fulfilled the terms of the order (in particular, paid the amounts stipulated), the court confirms the restructuring scheme has been implemented and all further claims are discharged (*Restschuldbefreiung*). Completed restructuring schemes are also effective vis-à-vis creditors who did not accept the proposal, creditors who did not take part in the restructuring proceedings or creditors who were unaware of the restructuring proceedings.

Creditors are often inclined to accept proposals for a restructuring scheme since the quota in that case will generally be higher than the quota ultimately generated by undergoing regular bankruptcy proceedings. However, the requirement that the debtor must demonstrate that it is capable of fulfilling a minimum quota of 20 per cent often limits the possibility of achieving a reorganisation by a restructuring scheme in practice.

Restructuring proceedings (*Sanierungsverfahren*)

The 2010 amendments of the Insolvency Act, which entered into force on 1 July 2010, abolished the Settlement Act (which used to regulate settlement proceedings) and replaced settlement proceedings with restructuring proceedings. Basically, two types of restructuring proceedings were introduced:
(i) restructuring proceedings where a bankruptcy receiver is appointed and where the debtor does not retain the right to self-administration (*Sanierungsverfahren ohne Eigenverwaltung*) and which are very similar to a restructuring scheme; and (ii) restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*). In each case, the main aim of the

restructuring proceedings is to enable the debtor to continue its business and to be discharged from part of its debts (*Restschuldbefreiung*).

If a debtor is an entrepreneur, a corporate entity, a partnership or a legal estate (i.e. not a private individual) it may, in lieu of initiating bankruptcy proceedings, apply for the commencement of restructuring proceedings (*Sanierungsverfahren*). Such an application can be made by the debtor if insolvency is imminent, or under the same circumstances as required for the commencement of bankruptcy proceedings (insolvency or over-indebtedness). The debtor's creditors are not allowed to file for the commencement of restructuring proceedings.

The debtor may file for restructuring proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*) for which it needs to attach a (simple) restructuring proposal to its application. The proposal must as a minimum contain proposals for the satisfaction of at least 20 per cent of the creditors' claims within two years. The debtor may also file for restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*). In this case, the debtor would need to submit a qualified restructuring proposal, for which a number of formal criteria need to be fulfilled and which, among other criteria, needs to propose the satisfaction of at least 30 per cent of the creditors' claims within two years.

Upon receipt of an application for restructuring proceedings and after having examined certain formal requirements, the court will formally open restructuring proceedings, appoint a receiver (bankruptcy or restructuring receiver, as applicable) and schedule a creditors' hearing.

In the case of restructuring proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*), the proceedings follow the procedure for restructuring schemes explained above. However, the rather pejorative term "bankruptcy" is avoided and it is clear that the debtor aims at restructuring its business from the outset. A further important difference compared with a restructuring scheme is that the debtor's business may not be liquidated prior to the lapse of a 90-day term. By contrast, in a restructuring scheme under bankruptcy proceedings, the business must be closed and liquidated if its continuation would increase the loss to creditors. If the restructuring proposal is not accepted by the creditors, the court will re-classify and continue the proceedings as formal bankruptcy proceedings (i.e. liquidation-oriented bankruptcy proceedings).

In the case of restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*) while the debtor retains legal capacity to perform certain acts and control the business, certain material actions and transactions require the consent of the court-appointed restructuring receiver (*Sanierungsverwalter*). The debtor will conduct its business under the supervision of the restructuring receiver. The court may withdraw the right to self-administration under certain circumstances, in which case the restructuring proceedings will be re-classified and continued as restructuring proceedings where a bankruptcy receiver has been appointed (the restructuring receiver will be re-classified as bankruptcy receiver). Only if the restructuring as a whole fails (because the creditors do not accept the restructuring proposal) will the proceedings be transformed into formal bankruptcy proceedings (i.e. liquidation-oriented bankruptcy proceedings).

For restructuring proceedings where the debtor retains the right to self-administration the first creditors' hearing must take place within three weeks from the commencement of proceedings. At this meeting the restructuring receiver will outline the terms of the debtor's restructuring proposal and whether they consider that the proposal is realistic and may be fulfilled based on the economic situation of the enterprise. Otherwise, these proceedings follow the procedure for restructuring schemes set out above.

Business reorganisation

The concept of business reorganisation was introduced in 1997 by the Business Reorganisation Act (the **Reorganisation Act**). However, the procedure set out in the Reorganisation Act has only been used in very few cases since its introduction.

Reorganisation under the Reorganisation Act is only available to a solvent debtor (entrepreneurs only), ie companies, partnerships or individuals who engage in entrepreneurial activities and for whom the insolvency criteria does not apply. The aim of the Reorganisation Act is to enable otherwise economically stable businesses facing temporary financial difficulties to continue their business activities through a reorganisation process.

The Reorganisation Act provides for a definition of the circumstances in which the necessity for reorganisation is assumed to exist on the basis of a rather complex formula, which includes evaluating the capitalised value of the anticipated yield of the company.

Only a debtor may file an application for business reorganisation, which must include a reorganisation plan. Generally, it may do so on a voluntary basis but the Reorganisation Act provides for personal liability for certain statutory organs of business entities obliged by law to undergo a full audit if they fail to file an application for the commencement of reorganisation proceedings where an audit reveals the necessity for a reorganisation (determined according to the complex formula set out in the Reorganisation Act). In such a case, these entities will be held personally liable for claims of up to €100,000 that are not discharged in any insolvency proceedings commenced within a period of two years. The Reorganisation Act also provides for certain exceptions to these liability rules, as well as, under certain limited circumstances, personal liability of the members of a supervisory body or shareholders of businesses obliged by law to undergo a full audit.

If no reorganisation plan is filed with the application, the court will request that such a plan be submitted within 60 days. The reorganisation plan must, inter alia, state:

- the reasons for reorganisation
- measures for the improvement of the financial/profit situation
- measures for obtaining new financial funds
- the effect of the reorganisation on employees,
- the period of time necessary for the reorganisation (which must not exceed a period of two years)

Furthermore, in the event that third party rights are affected by the reorganisation plan, the debtor must provide evidence of such third parties' approval of the reorganisation plan.

Upon receiving the application, the court initiates business reorganisation proceedings by appointing a temporary reorganisation auditor (*Reorganisationsprüfer*). Such a decision is not publicly announced in order to avoid jeopardising the reputation of the debtor. This constitutes a significant difference compared with insolvency proceedings under the Insolvency Act. The reorganisation auditor needs to state whether the debtor is still solvent and, in such a case, is required to produce a positive expert opinion on the likelihood of the success of the reorganisation plan within 30 days of receiving it. Once this opinion has been produced court involvement in monitoring the execution of the reorganisation plan ends.

While the reorganisation plan is in force, the debtor has to report to the creditors on the status of its enterprise and the progress of the reorganisation every six months, or if the circumstances underlying the reorganisation plan have changed.

Informal settlement (*außergerichtlicher Ausgleich*, *stiller Ausgleich*)

An informal settlement does not involve the courts and is achieved by agreement among the creditors and the debtor to reduce the level of the debtor's outstanding obligations. This procedure is aimed at ultimately saving the debtor from bankruptcy, and the absence of formality means that the procedure is quicker and less expensive than insolvency proceedings. Furthermore, informal settlements are not made public and may thus spare the debtor from unwelcome publicity concerning formal insolvency proceedings.

For informal settlements to be effected, no minimum quotas are prescribed. Usually, a contract is concluded between the debtor and the creditors, which results in the debtor being released from its obligation to repay a certain part of the debt, while agreeing to pay for the remaining portion of the debt in instalments. In practice, informal settlements are achieved by negotiations between the debtor and the creditors. Often, professional creditors' organisations (AKV, KSV, Creditreform, ISA) play an important role in these negotiations since creditors entrust one of these institutions with representing them in order to ensure that the debtor's proposal is reasonable.

However, contrary to the court-controlled restructuring scheme or restructuring proceedings in which the consent of a majority of creditors is sufficient to accept the proposal, an informal settlement needs to be reached with all of the debtor's creditors. This may be difficult to achieve, particularly in cases in which a debtor has many creditors, or contributions are owed to social security authorities, who generally do not consent to such proposals. If even one creditor refuses to consent to a partial discharge of its claim, an informal settlement may not be concluded. This situation may sometimes be avoided by paying the respective creditor a higher quota, provided that all other creditors agree to such preferential treatment.

Furthermore, creditors often render informal settlements impossible by filing for involuntary bankruptcy proceedings.

Finally, additional important obstacles to a successful informal settlement are the tight statutory deadlines for filing for insolvency proceedings (60 days), which usually leave little time for the debtor to negotiate informal settlements.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

Of the above restructuring and insolvency regimes, bankruptcy proceedings (*Konkursverfahren*); restructuring proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*); and restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*) were available as main proceedings under the Original Regulation.

Only bankruptcy proceedings (*Konkursverfahren*) were available as secondary proceedings under the Original Regulation.

Under the Recast Regulation, bankruptcy proceedings (*Konkursverfahren*), restructuring proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*), and restructuring proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*) are listed in Annex A.

Further information

For further information on Austrian restructuring and insolvency procedures, we would refer you to the Sweet & Maxwell book "European Cross Border Insolvency" edited by Allen & Overy. To purchase a copy of this book, please visit www.sweetandmaxwell.co.uk

This fact sheet has been prepared with the assistance of Wolf Theiss.

Allen & Overy has launched an online service for clients focusing on debt restructurings and insolvency issues.

Developed by Allen & Overy's market-leading Restructuring group, "Restructuring Across Borders" is an easy to use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe and the US.

To request access for your organisation, please contact your usual Allen & Overy contact, or email rab@allenovery.com

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