THE INSOLVENCY REVIEW

Seventh Edition

Editor
Donald S Bernstein

THE LAWREVIEWS

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PREFACE

This seventh edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries. A debt of gratitude is owed to the outstanding professionals around the world who have dedicated their time and talents to this book. As always, their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

In a prior edition of this book, we examined the challenges faced by multinational enterprise groups attempting to restructure under diverse and potentially conflicting insolvency regimes. At that time, the European Parliament and Counsel had recently published the Recast Insolvency Regulation,[1] which included provisions relating to cooperation and communication across group restructuring proceedings in multiple jurisdictions, and UNCITRAL's Working Group V was in the process of developing its Enterprise Group Insolvency: Draft Model Law (the EGI Model Law).[2] This year's edition provides an occasion to revisit this topic in light of the Working Group's EGI Model Law and the EGI Model Law's Guide to Enactment (the Guide to Enactment).

The EGI Model Law is designed to provide states with a legislative framework to address the cross-border insolvency of enterprise groups, complementing the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide, part three).[3] What distinguishes the EGI Model Law from the Model Law, which concerns itself with multiple proceedings of a single debtor, is the focus on multiple insolvency proceedings relating to multiple related debtors.[4]

The EGI Model Law defines 'enterprise group' as two or more entities, regardless of legal form, that are engaged in economic activities and may be governed by insolvency law, that are interconnected by control or significant ownership.[5] When members of an enterprise group are located in different jurisdictions, the EGI Model Law is intended to support cross-border cooperation and coordination with respect to their insolvency proceedings and establish new mechanisms that can be used to develop and implement a solution for the group (a

1 Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast), 2015 O.J. (L 141) <https://eur-lex.europa.edu/eli/reg/2015/848/oj>.

2 See UNCITRAL, Report of Working Group V (Insolvency Law) on the Work of its Forty-Fifth Session (New York, 21 to 25 April 2014), U.N. Doc. A/CN.9/803 (6 May 2014) <https://undocs.org/en/A/CN.9/803>.

3 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.

4 ibid., at I.A.3.

5 EGI Model Law, at Article 2.

group insolvency solution) through one (or potentially more) insolvency proceedings (each a planning proceeding) taking place in a state where a group member has its centre of main interests (COMI).[6] A planning proceeding is a main proceeding commenced in respect of an enterprise group member provided (1) one or more other enterprise group members are participating in that main proceeding for the purpose of developing and implementing a group insolvency solution, (2) the enterprise group member subject to the main proceeding is likely to be a necessary and integral participant in that group insolvency solution, and (3) a group representative has been appointed. The group representative will be able to seek a wide range of relief in any group member's insolvency proceeding. Ultimately, a group insolvency solution can be a reorganisation, sale or liquidation of some or all of the assets and operations of one or more enterprise group members, with the goal of protecting, preserving, realising or enhancing the overall combined value of those enterprise group members.[7] The EGI Model Law does not address the procedure for seeking approval of the group insolvency solution, leaving that to the law of the approving jurisdiction.[8]

The court overseeing the planning proceeding may grant certain types of relief if necessary to preserve the possibility of developing or implementing a group insolvency solution.[9] These forms of relief include, among other things, staying execution against the assets of an enterprise group member, suspending the right to transfer, encumber, or otherwise dispose of any assets of an enterprise group member, staying the commencement or continuation of individual actions or individual proceedings concerning the assets, rights, obligations or liabilities of an enterprise group member, and approving arrangements concerning the funding of an enterprise group member and authorising the provision of finance under those funding arrangements.[10] With respect to approval of post-filing funding arrangements, the Guide to Enactment notes that the court might take into consideration various criteria, including whether the funding arrangement is necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of its estate, whether any harm to creditors of that enterprise group member will be offset by the benefit to be derived from continuing that funding arrangement, whether the funding arrangement safeguards the development of a group insolvency solution, and whether the interests of local creditors are protected.[11]

Moreover, the EGI Model Law also seeks to minimise the need for commencement of non-main proceedings in a second state in which an enterprise group member has an establishment and facilitates the centralised treatment of claims in an enterprise group insolvency by including a mechanism under which such claims can be addressed.[12]

It remains to be seen how swiftly and extensively the EGI Model Law will be incorporated into national laws. There is reason to believe, however, that some of the 45 jurisdictions

6 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.

7 ibid., at Article 2(f).

8 ibid., at Article 26.

9 ibid., at Article 19.

10 ibid., at Article 20.

11 UNCITRAL, Enterprise Group Insolvency: Guide to Enactment, Working Group V (28 to 31 May 2019) <https://undocs.org/en/A/CN.9/WG.V/WP.165>.

12 ibid.

that have adopted the existing Model Law may act relatively quickly, given the need for an enterprise group solution and the public nature of Working Group V's work.

Recent experiences in high-profile enterprise group restructurings further underscore the benefits promised by this new regime. The United States Bankruptcy Court for the Southern District of New York quoted from a working draft of the EGI Model Law in its opinion denying recognition of the Dutch insolvency proceeding of Oi Brasil Holdings Coöperatief UA (Coop).[13] There, the Dutch trustee of Coop sought such recognition notwithstanding that:

a the Oi Group was a Brazilian enterprise that maintained nearly all its operations, management, principal executive offices, customers, assets and employees in Brazil;

b many of the Oi debtors, including Coop, were already subject to restructuring proceedings in Brazil (*recuperação judicial* (RJ));

c an RJ had previously been recognised by the US Bankruptcy Court as foreign main proceedings;

d Coop was merely a special purpose vehicle (SPV) used to finance the Oi Group as a whole; and

e Brazil was the preferred venue of the Oi Group.

The Coop dispute was highly contentious and costly, but had the EGI Model Law existed, the effects of the dispute might have been mitigated. The group representative of a hypothetical Brazilian planning proceeding for the Oi Group could have, among other things, petitioned the Dutch court for (1) recognition of the planning proceeding and (2) relief to support the development and implementation of an insolvency solution for the Oi Group as a whole. The existence and recognition of a planning proceeding might have reduced the likelihood of the contested recognition hearing in the United States. The same may be true for the case of OAS SA and its debtor affiliates, which also involved a COMI determination regarding a European SPV that served as a financing vehicle for a Brazilian enterprise.[14]

As I do each year, I want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a significant undertaking because of the current coverage of developments we seek to provide. As in previous years, my hope is that this year's volume will help all of us, authors and readers alike, to reflect on the larger picture, keeping our eye on likely, as well as necessary, developments, on both the near and distant horizons.

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September 2019

13 *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 243 (Bankr. S.D.N.Y. 2017) (noting that 'the promotion of cooperation between courts and other competent authorities among States involved in cases of cross-border insolvency affecting members of an enterprise group' is a key objective of both the Enterprise Group Insolvency Model Law and reflects current trends in international insolvency law).

14 *In re OAS S.A.*, 533 B.R. 83 (Bankr. S.D.N.Y. 2015).

Chapter 2

AUSTRIA

Gottfried Gassner and Georg Wabl[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

The relevant primary legislation is the Austrian Insolvency Code, which provides general rules and thereby builds the framework for the following types of judicial insolvency proceedings for enterprises:

a bankruptcy proceedings;
b restructuring proceedings with self-administration; and
c restructuring proceedings without self-administration.

Other than those that apply in other countries (such as Germany), there are no practically relevant preliminary insolvency proceedings in Austria. The general rules of the Insolvency Code, such as priority of creditors' claims, a statutory moratorium, termination rights or avoidance, apply to all the aforementioned proceedings. The main difference between them is that bankruptcy proceedings primarily aim to liquidate the debtor's assets whereas restructuring proceedings primarily aim to restructure a debtor's business with the support of the majority of creditors. Restructuring proceedings with self-administration are debtor-in-possession (DIP) proceedings (i.e., the debtor keeps control of day-to-day operations).

Special provisions relevant to insolvency are also provided by Austrian company law, tax law and employment law, as well as Regulation (EU) 2015/848 (the Insolvency Regulation (EIR)). In practice, the Austrian Equity Substitution Act, which potentially qualifies loans granted by shareholders as equity (and therefore statutorily subordinated) is also very relevant. The Austrian Business Reorganisation Act provides rules for corporate reorganisation proceedings (which are not insolvency proceedings) in relation to a solvent debtor's business that affect creditors' rights to a lesser degree. In practice, these types of proceedings are rarely applied.

Priority of creditors' claims

The Insolvency Code does not expressly provide for formal rules on classes or priority of creditors' claims. Structurally, creditors are prioritised as follows:

a preferential creditors such as those with a right to property regarding the assets of a debtor's estate or secured creditors;

1 Gottfried Gassner is attorney at law and partner, and Georg Wabl is attorney at law, at Binder Grösswang Rechtsanwälte GmbH.

b estate creditors that can demand full payment from the debtor's estate because their claims arise after the insolvency proceedings have opened (e.g., trade creditors contracting with the administrator or banks granting financing during proceedings);
c unsecured creditors receiving an insolvency quota; and
d statutorily or contractually subordinated creditors.

Statutory moratorium

Individual enforcement actions against a debtor are prohibited in all types of insolvency proceedings (i.e., there is a collective statutory moratorium). Creditors must instead file their claims in the insolvency proceedings and the insolvency administrator has to scrutinise and approve or reject each claim. If a claim is rejected, the creditor may sue the administrator for approval. In principle, this does not apply to preferential creditors whose claims are, as a general rule, not affected by the opening of insolvency proceedings.

Termination rights

The opening of insolvency proceedings does not automatically terminate or amend contracts. However, special provisions of the Insolvency Code allow, under certain circumstances, an eased termination by the debtor (in restructuring proceedings with self-administration) or the insolvency administrator (in restructuring proceedings without self-administration and in bankruptcy proceedings). However, contract partners may be prevented from termination to protect the debtor's estate from losing contracts that are essential for continuing the business. *Ipso facto* clauses (i.e., clauses allowing the termination of a contract simply because of the opening of insolvency proceedings over the assets of the other party) are not enforceable.

Avoidance

Austrian avoidance rules allow the challenge of legal actions and transactions that have taken place within certain clawback periods before the opening of insolvency proceedings. Avoidance actions are exclusively on the insolvency administrator. A successful challenge forces the other party to return received payments or transferred assets to the debtor's estate.

The challenged legal action or transaction must:

a have taken place within a certain clawback period before the opening of insolvency proceedings (from six months up to 10 years, depending on the specific avoidance rule);
b have been directly or indirectly detrimental to the insolvency estate; and
c meet the criteria set by one of the avoidance rules provided in the Insolvency Code (avoidance owing to an intent to discriminate, avoidance owing to squandering of assets, avoidance of transactions with no consideration and analogous transactions, avoidance owing to preferential treatment, or avoidance owing to knowledge of insolvency).

Avoidance owing to preferential treatment or knowledge of insolvency (respectively, a one-year and six-month clawback period) are most commonly argued by the insolvency administrator. These two provisions require the debtor's material insolvency at the time of the challenged action or transaction and shall protect the principle of equal treatment of creditors (*par conditio creditorum*).

ii Policy

A major insolvency law reform in 2010 resulted in debtor-friendly restructuring tools being strengthened. The reform aimed to facilitate the restructuring of viable businesses and to prevent liquidation. Nevertheless, as private workouts (silent out-of-court restructurings) are well established and tested in Austrian restructuring practice, large restructuring cases are often handled without court involvement.[2] The main challenge in a private workout is that there are certain rules regarding the protection and equal treatment (i.e., *pari passu* and *par conditio creditorum*) of creditors (in particular, directors' duty to file for insolvency).

Currently, there are no material reforms envisaged, but existing legislation is regularly evaluated. In response to the EIR, the Austrian legislature has amended the provisions of the Insolvency Code regarding cross-border constellations in both an EU and an international (i.e., non-EU) context.

Further changes in Austrian insolvency law may be required owing to harmonisation efforts being discussed at an EU level (including the recently adopted EU Directive on restructuring and insolvency, which will have to be implemented into Austrian law by 2021).[3]

iii Insolvency procedures

As stated in Section I.i, the corporate insolvency proceedings under the Insolvency Code are divided into bankruptcy proceedings, restructuring proceedings with self-administration and restructuring proceedings without self-administration.

Bankruptcy proceedings

Bankruptcy proceedings require a debtor's material insolvency (illiquidity or over-indebtedness) and are initiated after application by the debtor or a creditor.

As soon as proceedings are formally opened, an insolvency administrator is appointed by the court. The administrator is called a *Masseverwalter* and acts as a liquidator who is in charge of administering and selling the debtor's assets. Bankruptcy proceedings cannot be DIP proceedings (other than restructuring proceedings). Although these proceedings aim to sell a debtor's estate, the main focus is on continuing the business and to sell it as a going concern, provided that this does not jeopardise the interests of creditors.

If continuation of the business is not in the interests of the creditors, the insolvency administrator must shut down and liquidate the business.

The duration of proceedings may vary from several months to several years, depending on the case. The proceedings end by court order after a final distribution of the insolvency quota.

If a debtor wants to prevent his or her assets from being sold, he or she can still file a restructuring plan at any stage of the proceedings and thereby try to restructure the business as well as the insolvent entity itself.

2 Because of the confidentiality of such restructurings, no detailed statistics are available.

3 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

Restructuring proceedings

The aim of both restructuring proceedings with self-administration (i.e., DIP proceedings) and restructuring proceedings without self-administration is the restructuring of an insolvent entity as a going concern.

At the beginning of the proceedings, an administrator is appointed by the court, who either merely supervises the debtor (proceedings with self-administration, for which the administrator is called a *Sanierungsverwalter*) or manages and represents the entirety of the business (proceedings without self-administration, for which the administrator is called a *Masseverwalter*, as in bankruptcy proceedings).

The proceedings are only called restructuring proceedings if the debtor presents a restructuring plan with the initial application to open insolvency proceedings. The plan must provide for a minimum restructuring quota of 30 per cent for proceedings with self-administration and 20 per cent for proceedings without self-administration (payable in each case within no more than two years).

The restructuring plan must be approved by:

a a creditors' meeting (there is a double-majority requirement, i.e., simple majority of the creditors present at the sanctioning hearing and of the represented capital of claims); and

b the insolvency court. Note that the court can only approve the plan if it:

- treats unsecured creditors equally (with rare exceptions);
- does not affect the rights of preferential and estate creditors; and
- is feasible and appropriate in comparison to alternative circumstances (liquidation of the business).

Timely quota payment leads to a debt discharge in the amount exceeding the restructuring quota; hence, the discharge can be up to 80 per cent of the unsecured debt.

Restructuring proceedings are debtor-driven. Creditors can neither force the debtor to present a restructuring plan nor present a restructuring plan (or a counterproposal) themselves. Creditors can therefore 'only' vote on and challenge the plan.

At best, restructuring proceedings can be completed within roughly three months (especially for self-administration as DIP must be revoked by the court if the restructuring plan is not approved by the creditors within 90 days of the opening of proceedings).

Ancillary insolvency proceedings

Ancillary insolvency proceedings are mainly relevant within the scope of the EIR. If the centre of main interest (COMI)[4] of the debtor is in another EU Member State but the debtor has a branch and assets[5] in Austria, a secondary insolvency proceeding can be opened in Austria, which is limited to the 'Austrian assets'. There are few examples of such proceedings, but the *NIKI Luftfahrt GmbH* case[6] has shown the various challenges in connection with ancillary proceedings. The duration of ancillary proceedings opened in Austria mainly depends on

4 Within the meaning of Article 3(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the EU Insolvency Regulation) [EIR].

5 Both within the meaning of Article 3(2) and Article 2 Nos. 9 and 10 EIR.

6 [2018] EIRCR(A) 679. Both Austrian and German courts considered themselves competent for main insolvency proceedings. Finally, the main insolvency proceedings were opened in Austria and secondary proceedings were opened in Germany (see further details in Section III.i).

the complexity of the main proceedings, the cooperation between the competent courts and the appointed administrators, among other things. Generally, proceedings in a cross-border context tend to take longer than purely national proceedings.

Outside the scope of the EIR, international jurisdiction is not harmonised and depends on the existence of bilateral treaties. Ancillary proceedings in this context have rarely been relevant to date.

iv Starting proceedings

Bankruptcy proceedings can be commenced by the debtor or creditors (including in ancillary insolvency proceedings). Restructuring proceedings can only be commenced by the debtor.

The main requirement for the opening of insolvency proceedings is the debtor's insolvency (i.e., illiquidity or over-indebtedness). Illiquidity within the meaning of the Insolvency Code means that the debtor cannot pay all debt as it falls due and is not able to acquire the necessary funds to satisfy all due debt within a reasonable amount of time (as a general rule, liquidity can be assumed if 95 per cent of due debt can be paid). Liabilities becoming due in future or not yet payable (e.g., deferred or statutorily subordinated liabilities) do not have to be considered; only matured liabilities are relevant. Over-indebtedness within the meaning of the Insolvency Code means that the debtor's liabilities exceed its assets based on liquidation values and the debtor has a negative forecast on its continued existence. The duty to file for insolvency for directors is linked to illiquidity and over-indebtedness (see also Section 1.v 'Debtor and directors').

Restructuring proceedings may be commenced by the debtor in a case of impending illiquidity, although there is no duty to do so.

Upon commencement by a debtor, proceedings are usually opened very quickly (i.e., within a few days). If creditors commence proceedings, the court must first assess whether the creditor is formally entitled and whether the debtor is indeed insolvent; this process may take weeks or even months.

Debtors may mainly oppose commencements by a creditor by arguing that the debtor, in fact, is not insolvent or that the creditor is not formally entitled.

v Control of insolvency proceedings

Insolvency proceedings are mainly controlled by the insolvency court and an appointed administrator, who must primarily seek to protect the creditors' interests. In restructuring proceedings with self-administration, the debtor can significantly influence proceedings.

Insolvency court

The insolvency court has a strong role in all insolvency proceedings from the beginning and is involved in, and competent for, all main decisions. The court, among other things, decides on the opening of proceedings, appointment of the administrator and a possible creditors' committee, the sale of the business or relevant assets, and the end of the proceedings.

In addition, the court supervises the proceedings and the actions of the administrator and debtor.

Administrator

The administrator is selected by the court from a list of potential candidates. In bankruptcy proceedings and restructuring proceedings without self-administration, he or she is called a

Masseverwalter; in restructuring proceedings with self-administration, he or she is called a *Sanierungsverwalter*. Administrators are usually lawyers; in most cases, an individual lawyer is appointed, rather than a law firm.

Neither the debtor nor creditors can formally influence the court's selection but they may try to put forward proposals.

The *Masseverwalter* must, in particular, manage the debtor's estate and inventory, and administer and sell the debtor's assets. He or she must meet the objective standards of a professional expert. A breach of the described duties may lead to personal liability. In restructuring proceedings with self-administration, these tasks are divided between the debtor and the supervising *Sanierungsverwalter*.

Debtor and directors

Before the opening of insolvency proceedings, directors are subject to a strict duty to file. As soon as it becomes objectively apparent that a debtor is illiquid or over-indebted, directors must file for insolvency proceedings without undue delay and not later than 60 days. This is considered a maximum period. If there are no directors, the duty to file falls to the controlling shareholders.

Directors keep their formal position also within insolvency proceedings. Their roles depend on the type of proceedings.

In bankruptcy proceedings and restructuring proceedings without self-administration, the debtor and its directors are automatically deprived of power from day one. However, directors remain formally appointed and must cooperate with the administrator. Further, the debtor is a party to the proceedings and can thereby challenge court decisions or try to influence the proceedings by presenting a restructuring plan.

In restructuring proceedings with self-administration, the debtor remains in the driving seat and the directors can continue running the day-to-day business, under the supervision of the court-appointed administrator.[7]

Shareholders

Commencement of insolvency proceedings does not affect the corporate structure, which is why shareholders keep their formal ownership rights. Still, they can as a general rule neither instruct the administrator nor participate in court hearings (unless they are also creditors). In restructuring proceedings with self-administration, shareholders may try to instruct the self-administrating directors.

There is no statutory debt-to-equity swap in Austria; thus, shareholders cannot be forced to sell or transfer their shares.

Creditors

Creditors cannot actively 'run' the proceedings but have certain rights of control. The creditors' committee is appointed by the insolvency court and must approve certain actions, as well as supervise and support the administrator.[8] In certain instances, appointment of a committee is mandatory (e.g., in the case of the sale of a business or in complex proceedings).

7 A current topic under discussion is whether directors in self-administration may be subject to the same liability rules as insolvency administrators.

8 Individual creditors do not have a formal right to become part of the committee.

Further, creditors have access to the court files, and can participate and vote in creditors' meetings and in court hearings. They can, for example, challenge court decisions or contest claims filed by other creditors. Most importantly, they have the right to vote on and approve or reject a proposed restructuring plan.

vi Special regimes

Besides the Insolvency Code, special regimes apply for banks (Act on the Recovery and Resolution of Banks), insurance companies (Act on the Supervision of Insurance Companies) and pension funds (Pension Fund Act). These types of institutions can still go into bankruptcy proceedings if the tools provided in the special regimes do not work out. The rules on restructuring proceedings generally do not apply to these institutions.

There is no concept of a group insolvency in Austria; each entity must be assessed individually and – if necessary – insolvency proceedings must be opened over the assets of each respective entity. In most cases, different administrators are appointed for each entity. In line with the EIR, rules on cooperation within group insolvencies have also been included in the Insolvency Code.

vii Cross-border issues

The implications of the EIR have already been addressed. Foreign insolvency proceedings are automatically recognised in Austria if they are mentioned in Annex A of the EIR. Outside the scope of the EIR, foreign insolvency proceedings tend to be recognised if the COMI is in the respective foreign country and the basic principles of the foreign proceedings are comparable to Austrian insolvency law.

Challenges in relation to cross-border insolvency often result from the varying interpretations of COMI in different Member States (as shown in the *NIKI Luftfahrt GmbH* case). Besides, matters of cross-border cooperation between courts and insolvency administrators have not yet been tested extensively.

Forum shopping of companies happens occasionally but is not a frequent problem in Austria as there is a well-functioning private workout practice.

II INSOLVENCY METRICS

Compared to the strong growth during 2017 and 2018, economic development in Austria slowed down in the first half of 2019. The decline in unemployment is also no longer as strong as it was in 2018.[9] Gross domestic product grew in 2018 by 2.7 per cent as compared with 2017. Economic growth was thus the strongest since 2011.[10] Accordingly, the number of company insolvencies fell again in 2018, as compared with 2017, which means that insolvencies are again at an all-time low. The decline in the number of insolvencies is not so much due to the robustness of the economy, but rather the extremely low interest rates,

9 See the latest statistics compiled by the Austrian Public Employment Service (*Arbeitsmarktservice Österreich*) at https://www.ams.at/content/dam/download/arbeitsmarktdaten/%C3%B6sterreich/berichte-auswertungen/001_uebersicht_aktuell_0519.pdf (accessed on 3 July 2019).

10 See the latest statistics compiled by the Austrian Economic Chambers (*Wirtschaftskammer Österreich*) at http://wko.at/statistik/prognose/prognose.pdf (accessed on 3 July 2019).

which keep even weak and highly indebted companies alive. However, in 2018, the numbers of both affected employees and company liabilities have risen noticeably as a result of some major insolvencies.[11]

Around 5,000 companies filed for insolvency during 2018.[12] In the first six months of 2019, there were about 2,600 filings[13] (almost as many as in the first half of 2018).[14] Most insolvencies were opened in Vienna. Insolvencies with total liabilities of more than €100 million are rather rare (the most recent insolvencies of this size are Waagner Biro, NIKI Luftfahrt GmbH and MFC Corporate Services GmbH). The vast majority of company insolvencies relate to small companies with liabilities of less than €2 million (around 95 per cent in 2018). Almost 60 per cent of insolvencies affect relatively young businesses (established in 2010 or later). Most insolvencies affect Austrian limited liability companies (around 45 per cent) or individual businesses (around 40 per cent). Insolvencies of stock corporations or private foundations are very rare.

The industry sectors that are most affected are construction (about 20 per cent of all company insolvencies in 2018), corporate services (about 18 per cent), hospitality (about 14 per cent) and traffic (around 8 per cent, mostly because of the insolvency of NIKI Luftfahrt GmbH).

In 2018, around 87 per cent of insolvencies were bankruptcy proceedings (primarily seeking the winding up of the company) and only about 13 per cent were restructuring proceedings (with the aim of a restructuring of the insolvent entity). However, statistics show neither how many businesses were restructured in private workouts nor in how many of the bankruptcy proceedings was the business sold as a going concern or if a restructuring plan was presented at a later stage.

III PLENARY INSOLVENCY PROCEEDINGS

During 2018 and the first six months of 2019, several large plenary insolvency proceedings determined the press landscape. The following are the most interesting examples.[15]

i NIKI Luftfahrt GmbH

This has been one of the most widely followed and discussed insolvency cases.[16] *NIKI Luftfahrt GmbH* was an Austria-based airline limited liability company with more than 1,000 employees and more than €150 million of liabilities, which formed part of the German Air Berlin group. Following the opening of insolvency proceedings over the assets of Air Berlin in Germany and after the sale of NIKI to Lufthansa failed, NIKI also filed for insolvency in Germany in

11 See the detailed statistics for 2018 compiled by Kreditschutzverband 1870 (the largest Austrian association for the protection of creditors) at https://www.ksv.at/media/940/download (accessed on 3 July 2019). There was also a record rate of private insolvency proceedings in 2018 because of a recent change in legislation.

12 Around 2,000 of them were not opened because of a lack of cost-covering assets.

13 Around 1,000 of them were not opened because of a lack of cost-covering assets.

14 See the detailed statistics for the first six months of 2019 compiled by Kreditschutzverband 1870 at https://www.ksv.at/KSV1870_PA_Insolvenzstatistik_Unternehmen_HJ2019_HR (accessed on 3 July 2019).

15 The examples chosen do not address out-of-court restructurings that were also partly discussed in the media.

16 Reports in the press include: https://www.reuters.com/article/us-niki-m-a-lauda/sale-of-austrian-airline-niki-to-lauda-has-closed-insolvency-manager-idUSKCN1GC2VF; https://uk.reuters.com/article/uk-iag-niki/airline-niki-submits-insolvency-filing-in-austria-idUKKBN1F019N; www.dw.com/en/insolvency-of-austrian-airline-niki-strands-thousands/a-41780052 (all accessed on 3 July 2019).

December 2017. NIKI was registered in the Austrian companies' register and its corporate seat was in Austria. However, NIKI argued that its COMI was in fact in Germany because, among other things, its airline operations were handled by Air Berlin to a large extent.

Preliminary insolvency proceedings were opened in Germany and the preliminary German insolvency administrator sold most of NIKI's assets (particularly slots) to IAG/Vueling after an exciting bidding process during the Christmas holidays. IAG/Vueling also granted post-commencement financing. Before the closing of this sale, an Austrian creditor challenged the decision of the German insolvency court to open preliminary proceedings in Germany and filed for the opening of main insolvency proceedings in Austria. The creditor argued that the COMI of NIKI was in fact in Austria.

In January 2018, the German court of appeal confirmed the creditor's argumentation and, a few days later, main insolvency proceedings were opened in Austria. This was particularly controversial as there was still the possibility of an appeal being filed against the decision of the court of appeal in Germany. However, the Austrian competent judge argued that there was no German proceeding any more and therefore considered himself competent to open main insolvency proceedings in Austria. So as not to jeopardise a possible sale of NIKI's business, the parties refrained from starting a complex court dispute but found a practical solution instead. The main insolvency proceedings in Austria therefore continued and the German insolvency proceedings were modified into secondary insolvency proceedings.

The Austrian main insolvency administrator and the German secondary insolvency administrator then started a second bidding process and finally sold most of NIKI's assets to Laudamotion (a new airline established by the Austrian entrepreneur Niki Lauda, the initial founder of NIKI). The insolvency proceedings in Austria and Germany are still pending.

This insolvency showed in particular the challenges connected with cross-border insolvencies. Proceedings are still running as the administrator has to work through several issues and assess possible claims to several stakeholders.

ii Waagner Biro

The insolvency of the Waagner Biro group was the largest in 2018, with liabilities amounting to €194.1 million. Founded in 1854, Waagner Biro is one of the most traditional Austrian businesses and is best known for its involvement in spectacular projects such as the Louvre Abu Dhabi, the Reichstag dome in Berlin, the Sydney Opera House and the Elbphilharmonie in Hamburg. The group, which employed around 1,500 people, fell into difficulties mainly because of two major projects: in particular, the steel construction at the Louvre Abu Dhabi caused problems because of withheld payments; and the construction of the new Gazprom headquarters in St Petersburg also resulted in losses.[17]

In total, four members of the Waagner Biro group (Waagner-Biro AG, Waagner Biro Stahlbau AG, Waagner Biro Bridge Systems AG and WBB Stahl- und Maschinen Bau GmbH) filed for insolvency in October and November 2018 (two bankruptcy proceedings and two restructuring proceedings without self-administration).

17 Reports in the press include: https://diepresse.com/home/wirtschaft/economist/5518281/Waagner-Biro_Zahlungsausfall-in-Abu-Dhabi bedroht?direct=5522251&_vl_backlink=/home/wirtschaft/unternehmen/5522251/index.do&selChannel=; https://www.theartnewspaper.com/news/austrian-company-behind-louvre-abu-dhabi-dome-is-insolvent-after-non-payment; https://www.constructionweekonline.com/article-50784-austrias-waagner-biro-begins-restructuring-after-insolvency-filing; https://www.derstandard.at/story/2000093796208/waagner-biro-fuehrt-pleiten-ranking-an (all accessed on 3 July 2019).

The initial restructuring proceedings of Waagner-Biro AG were converted into bankruptcy proceedings and subsequently the main subsidiaries held by Waagner-Biro AG were sold. The restructuring plan of Waagner-Biro Bridge Systems AG also failed at first and the subsidiary was to go bankrupt. However, investors were found and another restructuring plan was submitted. The improved restructuring plan was accepted by the creditors, thus ensuring the continued existence of Waagner-Biro Bridge Systems AG.

The bankruptcy proceedings against Waagner-Biro AG, Waagner Biro Stahlbau AG and WBB Stahl- und Maschinen Bau GmbH are still pending.

This insolvency shows how fragile and vulnerable even traditional and arguably successful businesses can be when it comes to unexpected difficulties in ongoing projects.

iii Wienwert

In March 2018, the Wienwert group, a large real estate group with investments in several renowned real estate projects, had to file for insolvency (in fact, a total of 13 separate bankruptcy proceedings).[18] The group was mainly financed by bonds issued to more than 900 bondholders (many of them retail) in the amount of around €35 million. These bondholders may lose all their investment as the issuance was structured in a way that the bondholders did not receive security on the real estate itself.

The public prosecutor's office investigated the role of the (former) founders and management of the group (among others, regarding accounting fraud) especially in relation to the bond issuances. In April 2019, the insolvency administrator filed lawsuits against the auditors, tax consultants and management consultants of Wienwert in the total amount of around €14 million at the Vienna Commercial Court. The administrator argued that the real estate group became insolvent largely because of breaches of duty and culpable conduct by all the defendants; this led to a delayed insolvency and caused a quota damage to the creditors. The defendants deny the administrator's argumentation.

To allow a bundled representation of interests of bondholders, the insolvency court appointed trustees who are also part of the appointed creditors' committee.[19]

These proceedings show the immense importance of the acting persons and advisers in pre-insolvency situations as well as the risks they face.

iv Alufix

Alufix is an Austrian company that produces foils, baking paper and refuse sacks for households, restaurants and businesses. The company experienced payment difficulties after a cost-intensive expansion in eastern Europe, which was followed by increasing price pressure and declining sales.[20]

18 Reports in the press include: https://diepresse.com/home/wirtschaft/economist/5411753/Glaeubiger-verlieren-bei-WienwertPleite-alles; https://derstandard.at/2000075960206/Nach-der-Holding-geht-auch-die-Wienwert-AG-in-die; https://www.profil.at/wirtschaft/wienwert-wirtschaftspruefer-berater-mitverantwortung-10810897 (all accessed on 3 July 2019).

19 Austrian law allows this in certain circumstances.

20 Reports in the press include: https://diepresse.com/home/wirtschaft/economist/5640104/Folienfirma-Alufix-braucht-nach-Millionenpleite-einen-Investor (accessed on 3 July 2019).

On 7 March 2019, Alufix applied for restructuring proceedings without self-administration. Around 250 creditors and 170 employees filed claims amounting to €53.6 million, which were approved by the administrator in the amount of €41 million. In terms of liabilities, this was the largest insolvency in Austria in the first quarter of 2019.

At the sanctioning hearing on 13 June 2019, the creditors accepted the restructuring plan, which provides for a quota of 20 per cent in four instalments within two years. A predominantly Upper Austrian consortium finally took over the insolvent company, saving the jobs of around 170 Alufix employees.

This insolvency shows how Austrian insolvency law in the best case allows the debtor to return to normal business within three months. Within this time, the business found new investors, was financially restructured by achieving a 80 per cent debt haircut, and operationally restructured by taking advantage of eased termination rights, shutting down unprofitable business parts, among other things.

v Charles Vögele

The insolvency of the fashion chain Charles Vögele is particularly remarkable because the company had to file for insolvency twice within one year.[21]

In autumn 2018, the creditors had agreed to a restructuring plan offering a 20 per cent cash quota, which was distributed to the creditors by the insolvency administrator. At that time, Vögele was discharged from all its unsecured liabilities arising from the period before the opening of its first proceedings. Soon afterwards, however, as a result of a failed partnership with the strategic investor, the supply of goods for the remaining 57 stores could no longer be ensured to the extent required. Therefore, bankruptcy proceedings were opened on 3 May 2019 with the aim of winding up the company. The bankruptcy proceedings affect 394 employees, about 250 creditors and around €21.1 million of liabilities.

This shows that even the financial restructuring of a business may not guarantee its long-term success if the operational prerequisites are not secure.

IV ANCILLARY INSOLVENCY PROCEEDINGS

Ancillary insolvency proceedings do not have a major role in Austria. The best-known example of a cross-border insolvency in which the main and the ancillary proceedings opened in different Member States is the *NIKI Luftfahrt GmbH* case.

V TRENDS

As the Austrian economy is predicted to remain stable or continue to grow, it is not expected that the insolvency landscape will change substantially within the next year.

Existing legislation is regularly evaluated but, for now, no changes are envisaged. The harmonisation efforts discussed at an EU level (the recently adopted Directive on restructuring and insolvency) have led to a further dynamic in the respective working groups as it will have to be assessed how to implement the Directive into Austrian law. A first ministerial draft of the law is expected in 2020 with – from a current perspective – a very open outcome.

21 Reports in the press include: https://kurier.at/wirtschaft/zweite-millionenpleite-der-textilhandelskette-charles-voegele-austria/400482799 (accessed on 3 July 2019).

Appendix 1

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Gottfried Gassner is an attorney-at-law and partner at Binder Grösswang in Vienna. He specialises in insolvency and restructuring, corporate and mergers and acquisitions, focusing on cross-border matters. Recent restructuring experience includes advising the International Co-ordinating Committee in the restructuring of Steinhoff-Group, the TUI Group in the insolvency of NIKI/Air Berlin and a British investment fund in the acquisition of Qualter, Hall & Co Limited from the insolvency estate of Waagner-Biro AG.

In addition, Gottfried is vice chair (projects and publications) of the Insolvency Section of the International Bar Association (IBA), a former co-editor of *Insolvency and Restructuring International*, the journal of the IBA insolvency section, author of numerous publications regarding insolvency and corporate law, a member of INSOL International and ReTurn (an independent forum for the management of restructurings, reorganisations and turnarounds) and a lecturer in the areas of insolvency and corporate law at, among others, Danube University Krems.

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Georg Wabl is an attorney-at-law at Binder Grösswang in Vienna. He specialises in insolvency and restructuring, corporate and mergers and acquisitions, focusing on cross-border matters. He joined the firm in 2017 after completing an LLM programme with a focus on financial and corporate restructuring in London (QMUL). Recent restructuring experience includes senior roles in advising the International Co-ordinating Committee in the restructuring of Steinhoff-Group, the TUI Group in the insolvency of NIKI/Air Berlin and a British investment fund in the acquisition of Qualter, Hall & Co Limited from the insolvency estate of Waagner-Biro AG.

Georg is the author of several publications regarding corporate and insolvency law, is a regular speaker and a member of the International Bar Association and ReTurn (an independent forum for the management of restructurings, reorganisations and turnarounds).

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