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Survey of Austrian insolvency law and its current developments

Andreas Zahradnik
Dorda Brugger Jordis
Vienna

Austrian law distinguishes between composition proceedings in accordance with the Composition Code (*Ausgleichsordnung-AO*) and bankruptcy proceedings in accordance with the Bankruptcy Code (*Konkursordnung-KO*).

Bankruptcy proceedings have to be opened if the debtor is unable to pay. In particular, inability to pay must be assumed if the debtor suspends payments. Inability to pay does not require that creditors are actively seeking payment.

Bankruptcy proceedings are also opened in the event of over-indebtedness in relation to commercial companies if no personally liable partner is a natural person, in relation to the assets of legal entities and in relation to the estates of deceased persons.

A company will not automatically be considered over-indebted merely because the balance sheet shows that the liabilities exceed the assets. Hidden reserves of the company also have to be taken into account. Further, it might be established that the company has a positive earnings capacity in the future, that will enable it to repay its debt (going concern). Even if a company is not over-indebted, bankruptcy or composition proceedings have to be initiated if the company is insolvent.

Bankruptcy proceedings are instituted by the court after being filed for either by the bankrupt entity or a creditor. The debtor has to file a petition for bankruptcy if insolvent or over-indebted. Such a petition must be filed with the court immediately, at the latest within 60 days after insolvency or over-indebtedness has been established.

Once bankruptcy proceedings have been initiated, the debtor is deprived of all rights to dispose of its assets. These are thereafter administered exclusively by a receiver appointed by the court. All creditors wishing to obtain a pro rata payment must file their claims with the court. The receiver must then either acknowledge or object to a claim. During bankruptcy proceedings, legal action and enforcement measures are basically inadmissible.

The initial aim of bankruptcy proceedings is to satisfy all creditors equally. All creditors receive an equal proportion of their claim, based on the available assets. Where possible, the entity should be reorganised and continue to operate.

ALL CREDITORS WISHING TO OBTAIN A PRO RATA PAYMENT MUST FILE THEIR CLAIMS WITH THE COURT

The debtor may apply for compulsory composition in bankruptcy proceedings. Compulsory composition leads to exemption from residual debt, provided the debtor pays at least 20% of its debts within two years. This has to be approved by a qualified majority of the creditors.

If the criteria for the opening of bankruptcy proceedings are met, the debtor may file an application for composition proceedings to be opened in place of bankruptcy proceedings. Composition proceedings can only be instituted upon application by the debtor, if the debtor offers a minimum of 40% payable within two years. The composition needs to be approved by a qualified majority of the creditors. The advantage of composition proceedings is that the management of the debtor keeps control but is closely supervised by a court-appointed administrator.

Banks and investment firms may not opt for composition proceedings. However, special receivership proceedings exist that serve the purpose of achieving a reorganisation.

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The FMA (the Financial Services Authority) is required to revoke the licence of a bank or investment firm that has filed for bankruptcy. The FMA has the authority to file an application for bankruptcy proceedings. Once special receivership proceedings are pending, only the appointed receiver may file an application to initiate bankruptcy proceedings.

Special rules apply during the bankruptcy of natural persons, where the option of exemption from residual debt is generally available. Bankruptcy proceedings for natural persons who do not operate a business are described as debt settlement proceedings. A court will release a debtor from its residual debts if it pays at least 10% of the claims within seven years. If the 10% is not achieved within this period, the court may nevertheless release the debtor from its residual debts on the grounds of equity. For example, if payments reach the amount of capital exclusive of interest and costs, or if the creditors, upon granting the credit, knew or should have known that the debtor would not be able to pay the claim when due.

The federal government's Working Plan 2008 has shown that the Federal Ministry of Justice intends to reform the law on private bankruptcies. The aim of the reform is to grant people on a low income facilitated access to a release from residual debts and to extend the grounds upon which a debtor may be released from its residual debts despite a shortfall of the 10% minimum.

By the end of 2009, measures to ease the requirements for continuing operations should be in place. An amendment to corporate bankruptcy law will be filed at the earliest at the beginning of 2010.

THE FMA HAS THE AUTHORITY TO FILE AN APPLICATION FOR BANKRUPTCY PROCEEDINGS

In practice, voluntary reorganisation (composition) occurs rarely, due to the high level of required debt-payback (40% of outstanding debt). Involuntary reorganisations, with the much lower (20% in two years) requirement, do occur with greater frequency. The minimum should be lowered from 40% to 30%. The directors of a company should keep more administrative rights. With these and similar improvements the reorganisation and restructuring of companies would be simplified.